United States Court of Appeals

for the Second Circuit

APPENDIX

74-1327

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IN THE

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

BENJAMIN MALLAH,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S APPENDIX.

Volume III—Pages 1211 to End.

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(In the robing room; all counsel present.)

MRS. ROSNER: Your Honor, I have prepared a written application concerning the things we discussed, and I'd like to hand it up to the Court.

THE COURT: Just hold onto it so we don't get it out of order here. Let's finish this one thing up and then I will take that.

MRS. ROSNER: All right. I spent so much time writing on it I don't want to have my work go to waste.

THE COURT: Mr. Mitchell has raised the question of a voice identification outside of the presence of the jury on the notion that this is like a lineup, because this man has a rasping or other type of identifiable voice. And I wrote him back in substance that it seemed to me that what this witness has testified to does not call for voice identification at all because what he said was he saw Barrett come out, and saw him talking, and what he saw, the man's lips mouthing was what he testified to. That doesn't call for recognition of a voice.

Why can't you answer that yes or no?

MR. MITCHELL: Because there was no testimony that he saw his lips. He says that Barrett came out and Barrett said. Now, before I cross-examine, I think I am entitled to a voice test, Judge.

THE COURT: Well, I don't think you are entitled to it.

What do you say?

MR. LAVIN: I think it would be cleared up by asking him where they were in relation to the car. The same as Mr. Mallah. He testified he didn't hear Mr. Mallah's voice prior to that time. He saw where they were standing, what they said. He knew who Barney Barrett was.

THE COURT: It seems to me that you could proceed with your cross-examination, Mr. Mitchell, without any prejudice whatsoever and establish any predicate for such a test which seems not to be indicated by anything in the record at this time. You have full latitude when you get up to cross-examine.

MR. MITCHELL: May I have an exception.

THE COURT: You want the voice test before you ask questions?

MR. MITCHELL: That's right.

THE COURT: What do you want to test it for?

MR. MITCHELL: Very simple test, your Honor. He can sit in the armchair with his eyes blindfolded, and I will have the defendant and four other people, I will pick at random from the courtroom.

THE COURT: And will you let him see the five

people using their mouths?

MR. MITCHELL: No, your Honor.

THE COURT: I see. All right.

MR. LaROSSA: I don't think that's his testimony; that he saw the lips. I don't think he could see the person talking.

THE COURT: He testified he saw them coming out, and the only ones that he didn't see in total were the ones he described where he saw bodies, but the others he testified he saw in total. I was careful to make a note of that as he testified.

All right, you have an exception.

MR. LaROSSA: You were supposed to ask me questions.

THE COURT: Yes. What is it you are waiting for?

MR. LaROSSA: The witness said there are handwritten notes he gave to Mr. Lavin, I believe, in relation to this item.

THE COURT: You made a demand for them.

MR. LaROSSA: I have never received them.

MR. LAVIN: I don't recall ever seeing them. There probably are. I have sent some of the agents to look for them. I just don't recall seeing anything in with notes. I might add that the question was wrong. It is "thousand."

MR. LaROSSA: It says "then" on my copy.

MR. LAVIN: No, it says "thou."

MR. LaROSSA: We have a copy that says "50 then."

THE COURT: No, no, now if you say t-h-o-u is t-h-e-n, and you misread it, I think you ought to clear it up rather than have the Government --

MR. LaROSSA: Judge, I am not the only one who misread it. The witness misread it. I showed it to him and I said show me where it says 50 thou, and he said it does not.

THE COURT: Show him the original of the thing and let's stop using the photostats.

MR. LaROSSA: I haven't seen the original. If your Honor is going to allow the Government to show him the original and clear this up, then I respectfully submit that under the decision of the Second Circuit Court of Appeals where it is as if new 3500 material is being used --

THE COURT: Now, come, come. You operate with your own copy. I am gong to leave the thing stand as it is and let the jury see what you are talking about if there is any issue about that.

You know, let's not get into a series of trials on trivia. What is it that you have sent for, that material?

MR. LAVIN: Yes.

THE COURT: You just keep this policeman here if we don't get him right away, so we don't bog down.

MR. LAVIN: Yes.

THE COURT: And if the material shows up, show it to Mr. LaRossa. If it doesn't show up, he will have another crack at asking another question or two if he wants to. But we will preserve the balance of his cross-examination to him after you have a report as to whether such an item can be located. All right?

Now, next item.

MRS. ROSNER: Your Honor, I would renew the item which we spoke about.

THE COURT: This new item will be marked Court's Exhibit 33.

(Court's Exhibit 33 marked.

THE COURT: Let me read it.

I will read this off the record so everybody hears it at the same time.

(Discussion off the record.)

THE COURT: All right. Court's Exhibit 33.

MR. DUKE: I would like to join in that objection on behalf of Pacelli.

THE COURT: Mr. Duke joins in Court's Exhibit 33.

MRS. ROSNER: The reason why I press it in camera, your Honor, is that I think we would be very prejudiced by the Government asking all the questions leading to appropriate

objection by counsel. I think the matter would be fully set forth before the jury and if your Honor did sustain objections I think the damage would be done, Judge. That's why I press the matter in camera.

THE COURT: And I assume Mr. Duke joins you in that. pressure.

MR. PELUSO: I would join in that.

MR. MITCHELL: I join.

THE COURT: Everybody joins in the pressure?

MR. LAVIN: Except the Government.

THE COURT: All right, I resist the pressure.

Your problem is, the way I ruled your problem is this, Mr. Mitchell: The fair intendment of the testimony as I have heard it is that this witness had Mr. Barrett in view when Barrett was speaking, and consequently he has not relied upon anything which would call for voice identification tests as at this moment. If something develops which so requires, then I will deal with your request in Court's Exhibit 31 accordingly.

MR. MITCHELL: Thank you, your Honor.

THE COURT: All right. Let's resume.

(In open court; jury present.)

THE COURT: Mr. Mitchell, the reporter says he can keep going. We are waiting for some ink for the machine but

he says you can go on at the present time.

MR. MITCHELL: Your Honor, may I request the original of 3561.

THE COURT: There is the man you should request it of.

MR. MITCHELL: Thank you.

(Mr. Lavin hands document to Mr. Mitchell.)

THE COURT: Do you have it?

MR. MITCHELL: I have it now. Will you bear with me for one moment?

THE COURT: Surely.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Tell me, Officer, before you saw Number 3 leave the bar, did you know his name?

A No.

Q Will you look at the report of 8/16/72. Reading this part --

THE COURT: Is that 3561?

MR. MITCHELL: Is that 3561?

MR. LaROSSA: The copy I have is marked 3561.

MR. LAVIN: That's correct.

MR. MITCHELL: Yes, 3561.

Q Read this part to yourself.

A I just did.

Q All right. Does that refresh your recollection as to whether at the time you saw Number 3 enter the bar, you knew his name?

MR. LAVIN: Objection, your Honor.

THE COURT: No, he may answer.

MR. LAVIN: I don't believe that is the testimony at all.

THE COURT: What?

MR. LAVIN: I don't believe that is the testimony.

MR. MITCHELL: I just asked him the question before.

THE COURT: He may ask him the question.

A Can I hear the question again, please?

Q Before you saw Number 3 leave the bar, did you know his name?

A No.

Q This does not refresh your recollection?

A It says Number 3.

Q At 1523 hours did anybody enter the bar?

A At 1523 hours, I can't remember the exact time.

Q See if this refreshes your recollection.

THE COURT: Now, Mr. Mitchell, you have alternately said "leave the bar" and "enter the bar."

MR. MITCHELL: That's right.

THE COURT: Now you are talking about enter the bar.

MR. MITCHELL: All right, I will withdraw it.

THE COURT: All right.

Q Was there a time when you saw Herbie Sperling enter the bar?

A On that date?

Q Yes.

A Yes.

Q How many times did he enter the bar?

A I have no idea.

Q Did you make a report?

A Did I make a report of how many times Herbert Sperling entered the bar? No. Someone else might have. Someone else who was from the surveillance posts.

Q Did you supply any information as to a conversation that occurred at 1524 hours?

A Yes.

Q Up to that point, had you seen the individual you knew as Number 3, physically?

A I don't remember.

Q Had you seen him in any picture?

A Prior to this date?

Q Yes.

A Yes, I think so.

Q Do you remember what date?

A No, I don't.

Q When you were in the luggage compartment of the Cadillac, how were you lying? Were your feet to the front and your head to the back, or was your head crossways? How were you in there?

A I was lying with my head towards if you were facing the back of the car, my head would be on the right fender, and my feet would be on the left fender. I was lying sideways.

Q Across?

A That's correct.

Q And were you bunched up or was there enough room?

A No, there was enough room.

Q How tall are you?

A Five-eleven.

Q In other words, your head was on the right fender and your feet were to the left fender; is that right?

A If you are facing the rear of the car, that's right.

Q What?

A Facing the rear of the car, that's right.

Q And you had the pillow where?

A By my head.

Q And were you lying on your stomach?

A At times.

Q And when you looked out of this directional signal, were you looking with both eyes or just with one eye?

A It would be with one eye.

Q One eye?

A Yes.

Q The directional signal is about two inches wide, isn't it?

A About two inches. Maybe a little less.

Q Assuming that you were where I am now, with your head facing towards you, and you are looking out, if there were somebody standing a foot away on the curb, but to about three or four feet to the right, you couldn't see him; is that correct?

A I don't know.

Q Well, you were looking out through a two-inch opening; is that correct?

A The further back I looked, the wider my range became.

Q In other words, you could see more towards the building line than at the curbline?

A That's true.

Q Where was Number 3, if you know, when you claim you heard Sperling talking to somebody?

A I don't know. I didn't see him at that time.

Q When did he come into your range of vision for the first time?

THE COURT: Mr. Mitchell, I think that you may be overlooking the fact that he testified to September 6 and you are presently questioning him on August 16. Is that of any assistance to you?

Q Do I understand -- I just want to get it correct -- that on August 16 you didn't see Number 3 and Sonny Gold participate in a conversation, but it was September 6, as his Honor suggests?

THE COURT: That is not what I suggested. Ignore my suggestion. Go ahead. I'm sorry for the interruption.

Q Were you in a car on August 16?

A Yes, I was.

Q And is that when you overheard the conversation or was it September 6 that you overheard the conversation?

A I overheard conversations on both dates.

Q When did you overhear the conversation between Number 3 and Sonny Gold, on both days?

A No, August 16.

Q On August 16? When in relation to Sperling's

conversation that you testified to before,how long after that did you first see Number 3 come into your line of vision?

A A few minutes.

Q Few minutes? Five minutes?

A I didn't record the time right there.

Q You didn't record the time?

A I didn't, no.

Q Did you ever tell anybody what time it was when he first came into your line of vision?

A They could see him.

Q What?

A They could see him.

Q In other words, somebody was supplying the time, you were supplying the conversation?

A I will ask you this: How long after you saw Sperling have the conversation you related and enter the bar did you first see Number 3 in conversation with somebody else?

A As I said before, a few minutes.

Q When you first saw Number 3, where was he on that date, for the first time?

A On that date?

Q Yes.

A Exiting the Gold Rail Bar.

Q Did you see him enter the bar?

A Yes, I saw him enter the bar.

Q When?

A After he had the conversation with Mr. Goldstein.

Q After he had the conversation?

A During.

Q Before he exited the bar to have the so-called conversation with Mr. Goldstein, how long before that had you seen him enter the bar, if you did?

A I didn't.

Q At what time did you take up observation?

A On that date? It was about between 1:30, 2:00.

Q What?

A Between 1:30 and 2:00. About that time.

Q And what time was this conversation between Number 3 and Sonny Gold?

A About three o'clock.

Q Will you look at this Government Exhibit 3561 for identification and tell me,just read it to yourself first. Look at when you arrived, and when you saw Number 3 for the first time.

A I arrived at --

Q Read it to yourself.

Would this reflect the correct time of your observation in the car when it is in front of the bar and grill?

Q Yes, it would.

Q And approximately what time did you start the observation?

A About 2:30.

Q About what time did you see Number 3 leave the bar for the first time?

A That I saw him? It was about 3:30.

Q Up to that point you had not seen him on that day; is that correct?

A I had not, that's correct.

Q What?

A I didn't, that's correct.

Q You didn't see him. I show you Exhibit 61-A and ask you if you know what time that was taken.

A No, I do not.

Q I show you 61-C and ask you whether you know what time that was taken.

A No, I do not.

Q What did Number 3 say? Just Number 3.

A Just Number 3?

Q Yes.

A "I don't know. Yes, we should have it by tomorrow," or "Yeah, we should get it."

Q Was there anything unusual about the voice of

Number 3?

A He has a -- it is more like a gruff, high-pitched voice. It is really, you know, as I remember it.

Q You never heard the voice before?

A No.

Q You never heard it afterwards?

A Yes, I did.

Q When?

A On a number of occasions.

Q Did you hear the voice taking policy bets?

A No.

Q Did you hear the voice complaining about his physical condition?

A Yes, on one occasion.

Q Did you hear the voice, Number 3, responding to advice to go home?

A Yes.

Q Did you hear the voice of Number 3 responding to the fact that he was being called a nut?

A No.

Q Never heard anything --

A Not that I can remember, no.

Q Do you remember the occasion when you heard Number 3 being told to go home?

A Fairly well. I think so.

Q Was that the occasion when Number 3 complained of pains in his head?

A He complained --

Q Just answer me yes or no.

MR. LAVIN: Objection.

THE COURT: The objection is overruled.

A I don't remember it being pains in the head.

Q Would you say it wasn't? That nobody said pains in the head?

A Would I say that nobody said --

THE COURT: Now, you are not talking about the individual saying it to somebody else?

Q I am talking about Number 3 saying, "I've got pains in my head." Would you say that didn't occur in your hearing?

A He may have said he had pains in the head. I'm pretty sure I remember his conversation, what it was about, if you'd like me to tell it to you.

Q Did you ever hear a discussion between Number 3 and anybody about the reason Number 3 was not accepted in the Army?

A No.

Q In this conversation with Number 3 and Sonny Gold, was there any word used that you have been told in the course

at the Police Academy, or in instructions under the narcotics instructions that refer to narcotics?

A As far as the Police Academy goes? No.

Q Will you look at the conversation and see if there is any word in there that refers to narcotics?

A In my belief?

Q No, that refers to narcotics, not your belief. Is there any word there?

THE COURT: Is there anything in there that connotes narcotics to you?

THE WITNESS: Yes.

Q What word?

A "Going to get it."

Q "It"?

A That's right.

MRS. ROSNER: Your Honor, most respectfully, may I lodge an objection on behalf of my client. It calls for the operation of the witness' mind.

THE COURT: Objection is overruled.

Q Tell me, what object is there that you know that could not be covered by the phrase, "Is he going to get it"?

A None.

Q It could refer to anything; is that right?

A That's right.

Q It is unlimited?

A Yes.

Q Did you ever conduct a surveillance on Number 3 where you followed him home?

A Yes.

Q When was that?

A It was in October some time. I think around the middle of October, October 19 or 20.

Q About what time was it?

A It was in the evening.

Q Where did you pick up the surveillance?

A From in front of Ballantine's Hair Stylists.

Q Where did you follow him?

A To his -- to the hotel, I think it is right next to the Coliseum.

Q What?

A Right next to the Coliseum is a hotel. Winslow I think it is.

Q Is that on West 58th Street or West 56th Street?

A It is close to it.

Q What is it? Don't you remember?

A I think it is 58th.

Q Did you continue surveillance after he entered his hotel?

A Yes.

Q Did he leave the hotel?

A We stopped him as he entered the hotel.

Q Then did he go into the hotel?

A He was in the hotel when we stopped him, yes.

Q Then what happened after that?

A After we stopped him?

Q Yes.

A We asked him for identification, and we looked in a bag which he had, and he had --

MR. BARRETT: Your Honor, may I assist my lawyer?

THE COURT: Now, please. Just a minute. Would you kindly sit down?

Mr. Mitchell, do you want to go over and talk to him?

(Mr. Mitchell confers with Mr. Barrett.)

Q At that time was there another officer with you?

A Yes, there was.

Q What was his name?

A Patrolman Costas.

Q What?

A Costas, Patrolman.

Q Costas?

A Costas.

Q How do you spell that?

A C-o-s-t-a-s.

Q Costas. And at the point where you stopped the defendant did you have your guns drawn?

A Yes, I did. No, I didn't.

THE COURT: Wait a minute. What? Did you answer?

THE WITNESS: Yes, I did have it drawn.

Q And you pulled out your gun, and you pointed it at the defendant; right?

MR. LAVIN: Objection. Form of the question.

THE COURT: You may answer.

A And I pointed it at him?

Q Yes.

A Yes.

Q In fact, where did you place the gun in relation to the defendant's body?

A I probably -- I held it where it would be, you know, aimed at him, but I wouldn't place it anywhere on his body. I didn't place it on his body.

Q Where were you aiming at?

A The middle of his torso.

Q Where was -- did Costas draw his gun also?

A I don't remember whether he had his drawn or not.

Q Now, at that time when you picked up the surveillance, the defendant had a package; is that right?

A That's correct.

Q Did you see where he got the package?

A He brought it out of -- I think it was the Gold Rail Bar.

Q And having drawn the gun on him, did you tell him you were police officers?

A Yes.

Q Did you tell him he was under arrest?

A No.

Q Were you detaining him for the purpose of making a search?

A Yes.

Q Well, then he was under arrest, wasn't he? He couldn't leave with a drawn gun, could he?

A Yes, he could have.

Q What?

A He could have.

Q What would have happened if the defendant walked away without stopping and you had a gun drawn on him? You would have shot him; is that correct?

A No, that's not correct.

Q Tell me, did you open this package?

A Yes, I did.

Q What was it, a shopping bag?

A Yes.

Q What was in the shopping bag?

A A number of containers of Epsom salts.

Q A number of containers of Epsom salts?

A Yes.

Q How about anything else he had?

A He had another, I think some toiletries there. That's about all.

Q What?

A Toileteries. I don't remember exactly what else he had there. The Epsom salts stuck out in my mind.

Q Let me see if I can refresh your recollection. Were there oranges in there?

A There may have been. I don't remember.

Q Did you open up the Epsom salts?

A Yes.

Q Did you taste the Epsom salts?

A No.

Q Did you test it?

A No.

Q No doubt in your mind it was Epsom salts?

A No.

Q And at that point did the defendant tell you that he had the Epsom salts for a reason?

A Yes.

Q What was the reason that he had the Epsom salts for?

A His feet hurt.

Q Did he tell you why his feet hurt?

A Because he walks a lot.

Q Did he tell you why he walked a lot?

A No.

Q Did you ask him at the time you had him in custody there what his occupation was?

A Yes.

Q Did he tell you he collected policy bets?

A No.

Q You are sure of that?

A I'm positive.

Q Did you make a report of this arrest?

A What arrest?

Q The arrest of the defendant when you searched him.

A Defendant was not under arrest.

Q What?

A The defendant wasn't under arrest.

Q Did you tell him he was not under arrest and that he could walk away without showing you what was in the package?

A Yes, I did.

Q And having told him that he could walk away, did you

put your gun back in its holster?

A Yes.

THE COURT: I don't want you to do that again, Mr. Barrett.

MR. BARRETT: Mr. Pollack?

THE COURT: I don't want you to do that again.

MR. BARRETT: But look, Mr. Pollack, I am fighting for my life here and I am -- this man is lying.

THE COURT: Marshal, take this man out of the courtroom.

(Defendant Barrett left the courtroom.)

Now, I have told this jury before that sometimes it may happen that matter may be conveyed to you advertently or inadvertently which is not evidence in this case, for whatever the reason that anybody has. And I again ask you to disregard anything in respect to this incident. You are not to hold it against this defendant, and certainly not against any of the others, and you are certainly not to consider it evidence to enter into your consideration of the facts of this case. It is not evidence. The evidence is taken from the witness stand and the witnesses and the exhibits.

Please proceed, Mr. Mitchell.

Q Did you make a report of this search?

THE COURT: I may say that I will give you a moment to step outside to consult with your client, and you can let

me know when he is prepared to come back.

(Mr. Mitchell left the courtroom.and returned.)

MR. MITCHELL: My client would like to return to the courtroom.

THE COURT: Ask him to return and take a seat.

(Mr. Barrett entered the courtroom.)

MR. BARRETT: I apologize to the jury and to your Honor.

BY MR. MITCHELL:

Q How long a period of time went by from the time when you first pulled your gun on the defendant Barrett until you left?

A Five to ten minutes.

Q Tell me, did either you or Officer Costas leave at any time during that period of time and then return?

A Yes.

Q Who left?

A I think Patrolman Costas did. Patrolman Costas left.

Q Did he leave the building?

A No.

Q Did he go to a telephone?

A Yes.

Q And when he returned, did he give you instructions?

A Well, we left at that point.

Q What?

A We left at that point, yes.

Q But you didn't leave until Officer Costas gave you instructions; is that right?

A Yes. He came back and we left at that time. He didn't give me instructions. He just, you know, we left at that time.

Q He told you to leave?

A No. He didn't tell me to leave. We left.

Q Didn't he tell you that his superiors had advised both of you to apologize and leave?

A I don't remember his exact words. I know we did apologize and we did leave.

Q Wasn't that under orders?

A Yes, well, not -- under orders to leave, just to leave.

Q You wouldn't apologize, would you?

A Yes.

MR. LAVIN: Objection, your Honor. He didn't finish his answer.

MR. MITCHELL: I will withdraw that question.

Q Did you apologize?

A Yes.

Q What did you say to Mr. Barrett?

A "I apologize." The exact words?

Q Yes.

A I don't remember my exact words.

Q This was sometime in October of 1972?

A Yes.

Q Did you inform Mr. Barrett that you were looking for drugs?

A No.

Q Did you inform Mr. Barrett that there had been a burglary and you were looking for stolen goods?

A No.

Q What did you tell Mr. Barrett to justify this unlawful search?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q What did you tell Mr. Barrett?

A Well, we asked him if we can question him.

Q What?

A We asked him if we can question him. We identified ourselves, asked him if we could question him, at which time he said, you know, "Yes." There was nothing physical about it. I mean, we identified ourselves to him, we asked him if we could ask him a few questions, at which time he said yes. You know, there was no --

Q What were the questions you asked him?

A How long he was living there.

Q What did he tell you?

A What his name was.

Q What did he tell you?

A He lived there for a length of time. I don't remember the exact length of time he told me.

Q Wasn't it approximately five years?

A It may have been.

Q Did you check at the hotel to find out how long he lived there?

A My partner did, yes.

Q And as a result of that check, did you ascertain that he lived there the period of time that he told you?

A Yes.

Q Did you ascertain the rent he was paying?

A I don't remember finding out the rent that he was paying.

Q Did your partner check on his reputation in the hotel?

MR. LAVIN: Objection.

THE COURT: You may answer

A I think he did. I am not sure. You know, I wasn't there with him at the time when he was asking the questions.

Q This was when in October of '72, do you remember?

A In the middle of the month.

Q Middle of the month. And had you seen Mr. Barrett on another occasion leave the bar and grill with a package and go down to 49th Street and Broadway?

A Did I?

Q Yes.

A No, I don't remember specifically.

Q You don't remember?

A I don't remember.

Q Did you see him enter Kronfeld's Clothing Store with a package?

A No,

Q You are sure of that?

A Pretty sure, yes.

Q How many times did you follow Mr. Barrett?

A Once, maybe twice myself.

Q What?

A Once, maybe twice, myself.

Q Outside of the occasion of the Epsom salts?

A No, counting that.

Q What?

A Including that occasion.

Q When was the other occasion?

A It was just he walked up Seventh Avenue for a bit,

and then he went down going west on 55th, I think, and I just I dropped off surveillance. I was told to come back.

Q Did you ever follow him in an automobile up to 110th Street and Madison Avenue where he entered a bar?

A Yes, I did.

Q That is another occasion that you followed him?

A Yes.

Q How many times did you follow him up to the bar at 110th Street and Madison Avenue?

A I followed him up to that area I think once.

Q Was he carrying a package at that time?

A I don't remember.

Q Before you followed him, did you see him receive a package in the Stage Door Delicatessen?

A No.

Q What was the name of the bar he entered at Madison and 110th?

A I really can't remember the name of the bar.

Q Was it the Tintoretto bar?

A It was that -- that type of a name, yes.

Q Did you go into the bar?

A No.

Q You dropped your surveillance. When he entered the bar?

A Yes.

Q On the occasion when you stopped Mr. Barrett in the hotel, would you search your recollection to see whether it was you that left and not Officer Costas?

A It was -- I really don't remember. As I said, that's how I remember it.

Q What?

A It might have been myself or Officer Costas, but it was such a while ago that, you know, it was five or ten minutes, like I said, it wasn't --

Q Let me see if I can refresh your recollection. Do you remember returning and saying to Officer Costas, "They have already caught the culprit that took the woman's purse, let's go," and then apologizing to the defendant?

A No.

Q You don't remember that. Would you say that didn't happen?

A Yes.

Q Did you make any written report of the incident?

A Yes. We always make a written report.

MR. LAVIN: Would this be a good time to recess, your Honor?

THE COURT: All right. We will take a short recess while that is gone into.

The jury may go out for a short recess.

(Recess.)

MR. MITCHELL: May I proceed, your Honor.

THE COURT: Yes, please go ahead.

Q Was it your own idea to stop Mr. Barrett that night in the lobby of his hotel?

A No, it was not.

Q Who gave you instructions to stop him?

A My superior officer.

Q Who was your superior officer at that time?

A Sergeant De Luca.

Q Who?

A Sergeant De Luca.

Q The gentleman who testified previously?

A Yes.

MR. MITCHELL: I have no further questions.

THE COURT: Do you have any further questions, Mr. LaRossa?

MR. LaROSSA: Yes, I do.

THE COURT: Go ahead.

MR. LaROSSA: May I pass this up to you first?

THE COURT: Court's Exhibit 34.

(Court's Exhibit 34 marked.)

THE COURT: So far as you are aware, Mr. Lavin, is there any difference between the two items except that one is

in typewriting?

MR. LAVIN: As far as I am aware, no, there is no difference.

THE COURT: All right.

Go ahead, Mr. LaRossa.

CROSS-EXAMINATION

BY MR. LaROSSA:

Q Mr. Lino, how far was it from your vantage point in that automobile to the hotel?

A About 200 yards, or thereabouts. About 200 yards.

Q Was it more than one block?

A No. No, it was one block, but it was up, it was six flights up, which makes it different.

Q Your estimate is about 200 yards?

A My estimate.

Q Do you remember me asking you whether or not your report contained the phrase "50 thou"?

A Yes.

Q I show you what has been marked 3561 for identification. I ask you to read it to yourself, please.

Have you read it, sir?

A Yes.

Q Does that refresh your recollection that you put into the report "50 thou"?

A Yes, it does.

Q When I asked you before whether or not your report contained that phrase you were mistaken when you said it did not?

A That report that you showed me?

Q Yes.

A I didn't see it in that report. That's what you asked me.

THE COURT: Show it to him again.

A There is no "thou" in this report.

(The Court handed magnifying glass to the witness.)

THE COURT: All right. Can we make a stipulation about this and go on to something else?

MR. LaROSSA: I think we can stipulate that one is a photostat of the other.

THE COURT: Can we stipulate also as to that the letter appears to be indistinctly reported in the photostat and how they appear in the original?

MR. LaROSSA: I assume we can, yes.

THE COURT: All right. Isn't it fair to say that the photostat is indistinct but appears to contain the letters t-h-o-u which are distinctly reflected in the typewritten copy from which the photostat was made?

MR. LaROSSA: I think that is fair to state.

THE COURT: All right. Let's go on to something else.

Q Mr. Lino, you don't have an exact recollection of that conversation, do you?

A Exact? No.

Q And you didn't memorize the conversation in that car that day, did you?

A I tried my best to memorize it.

Q Did you memorize it?

A I thought I did, fairly well.

Q Do you remember testifying in this court in the spring of this year?

A Yes.

Q Do you remember being asked this question on page 282:

"Q. You didn't memorize the August 16 conversation either?

"A. No, I did not."

A Right.

Q Did you give that answer to that question?

A If that's what it says, yes.

Q Was it true?

A Yes.

Q Did you memorize it?

A I said I tried.

Q So what you did in effect, did you not, is put down some time that evening what you believed to be the words that you heard that day?

A Yes.

Q And you never told anyone what those words were until some time later that day; isn't that right?

MR. LAVIN: Objection to the form of the question.

THE COURT: Overruled.

You are to answer the question.

A I'm sorry. Can I hear the question?

THE COURT: He wants to know did you mention the details of the conversation to somebody else before you reported it in your report.

A Yes, I did.

Q Who?

A Sergeant De Luca.

Q When did you do that?

A Right after I got out of the trunk of the automobile.

Q Did he make notes of it?

A Yes.

Q Did you make notes as well?

A No. I relayed it and he made the notes.

Q When did you get out of that automobile?

A About an hour after the conversation.

Q By the way, this conversation that you related is not the only one that you heard in the trunk of the car that day; isn't that right?

A That's correct.

Q You heard conversations regarding -- Withdrawn.

You heard conversations about people you couldn't identify; isn't that right?

A On that day?

Q Yes, on August 16.

A Yes.

Q And you tried to report those to Sergeant De Luca as well, didn't you?

A Yes.

Q How many conversations did you report to Sergeant De Luca after you got out of that car?

A I think it was three.

Q And you tried to do it in narrative form, did you not?

A Yes.

Q And you tried to attribute certain words to certain individuals; isn't that right?

A Yes.

Q And as you sit there now, you are not absolutely sure of those words, are you?

A I am as sure -- when you say I am not sure, I am sure from what I said, yes. I wouldn't just make up a word to make it sound right. I would put down what I heard.

Q In other words, you remember each and every word that you testified to here?

A Yes.

Q And you didn't substitute any one word?

A No.

Q Nor fill in a word?

A No.

Q Nor give the general conversation?

THE COURT: I don't know what that question means.

MR. LaROSSA: I will withdraw it.

Q In other words, you memorized each and every word you heard, you gave it to us here in court; isn't that right?

MR. LAVIN: Objection to the form of the question.

THE COURT: It has been covered. Sustained.

Q Each of the words that you have attributed to each of the individuals that you have testified to here, are you absolutely sure of every word?

MR. LAVIN: Objection to the form of the question.

THE COURT: Overruled.

A Yes, I would have to say yes.

Q Do you consider your memory to be better than

average?

A No, I wouldn't say it is better than average.

Q You don't have a recall that's considered to be better than anyone else's that you have ever met, do you?

A I would say yes to that.

Q It is good?

A It is better than some people I have met.

Q Is it photographic?

A No.

Q Not that far?

A No.

MR. LaROSSA: I have no further questions, Mr. Lino.

THE COURT: Any redirect examination?

MR. LAVIN: No, your Honor.

THE COURT: All right. Thank you very much. You are excused.

(Witness excused.)

THE COURT: Next witness.

M O R T I M E R M O R I A R T Y , called as a witness by the Government, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LAVIN:

Q Mr. Moriarty, you are a special agent of the Drug Enforcement Administration, are you not?

A Yes, I am.

Q I direct your attention to September 26, 1973. Were you on duty that day?

A Yes, I was.

Q Can you tell us where you were?

A I was -- the exact location?

Q Well, yes.

A In the vicinity of Bronxdale Avenue and Paulding Avenue in the Bronx, I believe.

Q Did you do anything at that time?

A Yes, I did.

Q Tell us what that was.

A I arrested someone.

Q Who was that?

A Mr. Al Catino.

Q Do you see Mr. Catino in the courtroom?

A Yes, I do.

Q Would you point him out for the Court and jury, please?

A Sitting in the brown jacket with the brown turtleneck near the partition between the guests and the Court.

MR. LAVIN: Your Honor, may the record reflect that the witness has identified Alfred Catino?

THE COURT: Yes.

Q Can you describe for us the circumstances of the arrest?

A I was --

MRS. ROSNER: I am going to object to this, your Honor.

THE COURT: Overruled. I will take it subject to connection.

A Would you repeat the question?

MR. LaROSSA: I object on behalf of my client, your Honor.

THE COURT: Unless otherwise indicated this will relate solely to the defendant Catino.

What were the circumstances of the arrest?

A I was with Sergeant Bernard Gillespie of the New York City Police Department and we were there for the purpose of arresting Mr. Catino, and we had staked out his apartment house and we were waiting for him to come out of the apartment house. At one time I saw Mr. Catino walking on Bronxdale Avenue.

MRS. ROSNER: I am going to object to this, your Honor, and move to strike; irrelevant.

THE COURT: Don't get the entire narrative. The only question was the circumstances of the arrest.

A I saw Mr. Catino on the street. I told him -- I

followed him for awhile trying to catch up to him, and I told him to stop, that he was under arrest, and I arrested him.

Q Did he have anything with him at the time of his arrest?

A Yes, he did.

Q What was that?

A It was a paper bag containing a box containing eight pharmaceutical thermometers.

MRS. ROSNER: Your Honor, at this time I would renew the objection which was made in chambers.

THE COURT: The objection is overruled.

Q I show you what has been marked Government Exhibit 54 for identification. Can you identify that, please?

A Yes, I can. I see my initials on the back with the date.

Q What is Government Exhibit 54?

A It is a blue box containing --

Q Is this the box?

A Yes.

Q That you took from Mr. Catino?

A Yes, it is.

Q Was the label scraped off in that manner?

A Yes, it was.

Q I show you what has been marked Government Exhibits

54-A through Government Exhibit 54-H for identification. Can you identify each of those eight items, please?

THE COURT: Court's Exhibit 35 has been handed up. I repeat again, ladies and gentlemen of the jury, that this evidence is being taken as against the defendant Catino only.

(Court's Exhibit 35 marked.)

A Yes, I do. All eight contain my initials and the date 9/26/73.

Q That is each of Government Exhibits 54-A to 54-H; is that right?

A Yes, it is.

Q I show you 54-E for identification. Was that label scraped off in that manner when you seized it from Mr. Catino?

A To the best of my recollection, yes, it was.

Q Did each of these exhibits, 54-A through 54-H, contain inside the thermometer which is inside them now?

A Yes, they did.

MR. LAVIN: Your Honor, at this time the Government would offer Government Exhibits 54 and 54-A through 54-H in evidence.

MRS. ROSNER: I would renew all the objections previously noted, your Honor.

MR. MITCHELL: Your Honor, I object on behalf of

Defendant Barrett as to the admissibility.

THE COURT: It is being offered as against the defendant Catino and you object to it?

MR. MITCHELL: I have no objection to that.

MR. DUKE: Your Honor, I object on the basis of Court Exhibit 35.

THE COURT: Anything else?

Objection is overruled.

MR. LaROSSA: I join in theobjection raised in Exhibit 35.

THE COURT: You object to it being offered against Catino only?

MR. LaROSSA: Yes, sir, I do.

THE COURT: All right. As to you it is received subject to connection then, if you object to it on a limited basis.

MR. LaROSSA: No, I don't object in that manner. I object in any way to its being introduced, under United States against Bruton.

THE COURT: All right. Overruled.

54 and 54-A through H received.

(Government Exhibits 54 and 54-A through 54-H received in evidence.)

MR. LAVIN: Your Honor, may those exhibits be said

to include the case of the thermometer and the thermometer inside.

THE COURT: Yes.

Anything else? Any cross-examination, Mr. LaRossa?

MR. LaROSSA: No.

THE COURT: Mr. Duke?

MR. DUKE: No questions.

THE COURT: Mrs. Rosner?

MRS. ROSNER: Just a few questions, your Honor.

CROSS-EXAMINATION

BY MRS. ROSNER:

Q Mr. Moriarty, after you seized those thermometers from Mr. Catino, did you or one of your fellow officers or agents cause them to be submitted to a United States chemist?

A Yes, I did.

Q You did that personally, sir?

A Yes, I did.

Q And did you cause him to conduct an analysis to determine whether there was any trace of narcotics on any of those thermometers?

A Yes, I did.

Q And what was the result of that analysis?

A It was negative. There was no traces.

Q Of any narcotic?

A I caused it to be investigated for traces of heroin, specifically, and there was no heroin present which was the test I asked him to do on it.

Q Didn't you instruct the chemist to perform analysis to determine whether cocaine or any other controlled substance might have been on them?

A As I recall, it was explained to me by the chemist that if there were any traces, since those were immersion thermometers and would not have come in contact with the narcotic itself had they been used to test.

MRS. ROSNER: Your Honor, I move to strike that answer as not being responsive to the question asked.

A The chemist --

THE COURT: I think that -- what were you going to say?

THE WITNESS: The chemist instructed me that they -- if they could test for anything, they could probably only test for one drug because at that point they would have washed the thermometers and they wouldn't have -- they wouldn't be able to test for more than one drug, so they asked me to pick a drug that I wanted them tested for. As I recall, I picked heroin.

Q And the result of that analysis?

A Negative.

Q Was that there was no heroin present on those thermometers; is that correct?

A To the best of my knowledge, yes.

MRS. ROSNER: I have no other questions, your Honor.

THE COURT: Any questions, Mr. Peluso?

MR. PELUSO: No questions.

THE COURT: Any questions, Mr. Mitchell?

MR. MITCHELL: No.

THE COURT: All right. Any redirect examination?

MR. LAVIN: No, your Honor.

THE COURT: You may step down.

(Witness excused.)

D A V I D S A M U E L , called as a witness by the Government, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LAVIN:

Q Mr. Samuel, you are a special agent of the Drug Enforcement Administration, are you not?

A Yes, sir.

Q How long have you been with the Drug Enforcement Administration?

A Two and a half years.

Q I direct your attention now to August 17, 1973. Were you on duty at that time?

A Yes, I was.

Q Can you tell us where you were?

A Starting at midnight on August 17, 1973, I was in the vicinity of 420 East 66th Street, New York City.

Q Who were you looking for at that time, if anybody?

MR. LaROSSA: Objection.

THE COURT: Sustained.

Were you looking for anybody?

THE WITNESS: Yes, sir.

THE COURT: Who?

THE WITNESS: Benjamin Mallah.

Q Did you locate Mr. Mallah that night?

A Yes, I did.

Q Where did you locate him?

A At 420 East 66th Street, Apartment 3-F. We located Mr. Mallah at approximately 1:15 in the morning.

Q Did you enter the apartment?

A Yes, we did.

Q How did you obtain entrance?

A We knocked at the door. The individual inside opened the peephole. We identified ourselves and he opened the door and admitted us.

Q Did you search Mr. Mallah for any personal papers?

MR. LaROSSA: Objection.

Q At that time?

THE COURT: What, if anything, did you do at that time?

Objection is sustained.

What, if anything, did you do at that time?

THE WITNESS: Mr. Mallah was searched and handcuffed. He was brought into the bedroom, seated in a chair, and read his constitutional rights.

Q What happened after that, sir?

MR. MITCHELL: Objection, your Honor.

THE COURT: Taken subject to connection. You may go ahead.

A Personal papers and a sum of cash which was lying on the bedside table and on the dresser were seized. Mr. Mallah, the papers and money were then removed to our office.

MRS. ROSNER: Your Honor, may we have an objection on behalf of the other defendants and an instruction?

THE COURT: Yes. This evidence will be considered only against the defendant Benjamin Mallah.

Q I show you what has been marked 76 for identification. Can you identify that?

A Yes, sir. This is one of the items seized. It is an identification card from the East New York Savings Bank showing Mr. Mallah's --

MR. LaROSSA: Objection.

THE COURT: You can't say what it shows. East New York Savings Bank, you say?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Government's Exhibit 77 for identification.

A This is a savings account deposit book from the East New York Savings Bank.

Q 72 for identification.

A Application for social security card in the name of Morris Geller.

MR. LaROSSA: Objection.

THE COURT: Strike out the name. Just application for social security card.

Is there a date on it?

THE WITNESS: It is made out 9/28 -- excuse me -- 8/7/73.

Q Government Exhibit 73 for identification.

A This is a receipt for a television.

Q Government Exhibit 74 for identification.

A The lease, apartment lease.

Q Government Exhibit 75 for identification.

A A toupee.

Q And Government Exhibit 78 for identification.

THE COURT: Wait a minute now. Have you got the right number? Wasn't 78 the application?

MR. LAVIN: 72 was the application, your Honor.

THE COURT: Thank you. What was the next one after that? What was 78?

(Record read.)

Q What is 78 for identification?

A The sheet includes a Florida driver's license, Florida transfer registration certificate for sale of an automobile.

THE COURT: I don't think anybody can hear you, sir.

A Excuse me. A social security card, savings bank book from the Home Federal Savings in Hollywood, Florida, a receipt from an apartment in the amount of $132, Florida driver's license, and transfer tax certificate. All from Florida.

Q You testified a quantity of money was seized?

A Yes, sir.

Q Is that correct? How much was that?

MR. LaROSSA: Objection.

THE COURT: Overruled. Taken as to Mr. Mallah only.

A $8,552.56.

MR. LAVIN: May this be marked 79 for identification.

(Government Exhibit 79 marked for identification.)

MR. LAVIN: Your Honor, at this time the Government would offer Government Exhibit --

THE COURT: What is Government Exhibit 79?

Q Yes, what is Exhibit 79?

A If I could see the envelope I could -- Exhibit 79 is the $8,552.56 which I sealed in this envelope the night of the arrest. It is a plastic heat-sealed envelope.

Q Can you tell how much of that was in green currency and how much was in cash, from your notes there?

A I can't remember how I made the notes out. I believe it indicates approximately $5,000 in one hundred dollar bills, and the rest in various denominations.

Q How much silver was there?

A No more than three or four dollars.

MR. LAVIN: Your Honor, at this time the Government offers Government Exhibits 72 through 79 and we would ask that the change be included in 79.

MR. LaROSSA: Objection.

THE COURT: This is being received solely as against the defendant Benjamin Mallah and the objection is overruled.

Taken subject to connection.

MR. LaROSSA: My objection is based upon foundation.

THE COURT: I have received Court's Exhibit 36.

(Court's Exhibit 36 marked.)

THE COURT: Objection is overruled.

MR. DUKE: Your Honor, may the record show that 36 applies to the exhibits that were just now offered as well?

THE COURT: Anything else, Mr. Lavin?

MR. LAVIN: Yes, I'd like the witness to identify some of these items.

THE COURT: Go ahead.

MR. LAVIN: I thought there was an objection from Mr. LaRossa.

THE COURT: They are received in evidence as indicated.

(Government Exhibits 72 through 79 received in evidence.)

Q I show you Government Exhibit 72 in evidence. Can you tell us what that is?

A Application for social security card.

Q In whose name?

A Morris Geller.

Q What is the address there?

A 420 East 66th Street, Apartment 3-F.

THE COURT: And the date of it?

THE WITNESS: Dated August 7, 1973.

Q I show you Government Exhibit 73 for identification. Can you tell us what that is?

A 73 consists of a receipt for a Sony television.

MR. LaRossa: Objection.

THE COURT: Let me see that paper.

(Witness hands document to the Court.)

THE COURT: The objection is overruled and it is taken subject to connection in line with the procedure indicated in the robing room earlier today.

MRS. ROSNER: Your Honor, I take it that is subject to connection as to Mallah only?

THE COURT: As to what?

MRS. ROSNER: As to Mallah only.

THE COURT: Yes.

A It is a receipt for a Sony television for Mr. Geller, 420 East 66th Street.

Q And the piece of paper under that?

THE COURT: Dated what?

THE WITNESS: It is dated August 1, 1973, in the amount of $146.73. Attached to it, which I don't believe was mentioned the first time I looked at it, is an application for a First National City Master Charge Card in the name of Morris Geller, 420 East 66th Street, Apartment 3-F.

THE COURT: Dated when?

THE WITNESS: This is dated -- I don't see -- there is no date on it.

THE COURT: All right.

MR. LaROSSA: Move to strike the exhibit.

THE COURT: No, the motion is denied. Do you want to look at it?

MR. LaROSSA: I have seen it.

THE COURT: All right.

Q Government Exhibit 74 in evidence.

A Exhibit 74 consists of a standard apartment lease made out on the 27th of July 1973 in the name of Mr. Morris Geller,420 East 66th Street, Apartment 3-F. Rent in the amount of $200 per month.

Q Plaintiff's Exhibit 75.

A Exhibit 75 consists of a toupee which was found in the apartment, apartment 3-F.

Q Government Exhibit 76.

A Exhibit 76 is an identification card from the East New York Savings Bank in the name of -- there is no name on it but there is an account number.

Q Is there a picture on there?

A It is.

Q Whose?

A A picture of Benjamin Mallah.

Q What is Mr. Mallah wearing in the picture?

A He is wearing a toupee.

Q What else?

A And he is affecting a moustache.

Q I show you Government Exhibit 77 for identification.

MR. LaROSSA: I object and move that be stricken.

THE COURT: Let me see that a minute please, 76.

76 has the date August 3, 1973 on it. The objection is overruled.

That was Exhibit 76.

What did you say about 77?

THE WITNESS: 77 is a bank book from the East New York Savings Bank showing a deposit on August 3, 1973 for $300.

Q Is there a number on that bank book?

A Yes, it is the same account number as on the identification card.

Q Government Exhibit 76?

A Government Exhibit 76.

Q It bears the same account number as the bank book in the name of Morris Geller?

A Yes, it does.

Q I show you Government Exhibit 78.

A Government Exhibit 78 consists of a social security card in the name of David Barton, a bank book from Home Federal Savings and Loan Association of Hollywood, Florida, with a

deposit on May 16, 1972 for $300, a state of Florida driver's license for David Barton, 2008 Jackson Street, Hollywood, Florida, Florida transfer registration certificate for the purpose of a 1973 Pontiac in the name of David Barton, 2008 Jackson Street, Hollywood, Florida. A receipt for sales tax for the state of Florida in the name of David Barton, 2008 Jackson Street. And two receipts, received from David Barton amount of $265.01, and $13.29 on another. It says "for lease." I don't know what apartment they are for.

Q Government Exhibit 79.

THE COURT: Let me see that 78 a minute, please.

All right. Exhibit 79 is the next one.

A Exhibit 79 consists of the currency part of the money seized, the non-coin, at the time of the arrest.

THE COURT: Bills?

THE WITNESS: The bills.

Q Did you make a tally of the various denominations of the bills and the amounts?

A I believe a tally was made. I didn't make it personally.

Q Did Mr. Mallah have any identification on him in the name Mallah?

MR. LaROSSA: Objection.

THE COURT: I will sustain it in that form.

Q Did Mr. Mallah have any other identification?

THE COURT: Did you ask for any other identification other than the identification that you have described here?

THE WITNESS: We didn't ask for any and none other was found.

Q Did you make a search in the apartment for any other identification?

A Yes, we did.

Q What was the result of the search?

MR. LaROSSA: Objection.

THE COURT: Overruled.

A No other identification was found.

Q Had you been conducting a search for Mr. Mallah prior to that time?

A Yes, I had.

Q From when?

MR. LaROSSA: Objection.

THE COURT: Overruled. This testimony is all being taken only as to the defendant Benjamin Mallah.

You may answer.

A April 16, 1973, until the day of the arrest.

Q Can you tell us what efforts you made to locate Mr. Mallah?

MR. LaROSSA: Objection.

THE COURT: Overruled.

A Well, myself and Special Agent Levinson conducted a number of interviews at what we believed to be non-residences of Mr. Mallah in the New York area.

MR. LaROSSA: I object and move to strike.

THE COURT: Strike out everything about what you believed to be non-residences, and you may have in evidence that you made a number of searches.

What else?

MR. LaROSSA: I don't believe searches were what he testified to. I think he said interviews, your Honor.

THE COURT: Was it interviews?

THE WITNESS: Interviews.

THE COURT: Interviews; correction. Interviews.

A At the end of June 1973 I traveled to Miami, Florida for approximately one week in an attempt to locate Mr. Mallah.

If I could backtrack, at the beginning of June I interviewed Mr. Mallah's girl friend --

MR. LaROSSA: Objection. Move to strike.

THE COURT: Strike that out.

You interviewed a person.

THE WITNESS: Yes, a woman. Miss Nancy O'Malley.

And general surveillances were conducted throughout

the period at areas we believed Mr. Mallah frequented.

MR. LaROSSA: Objection, move to strike.

THE COURT: Strike out what you believed.

The jury will disregard what the officers believed. We are interested only in the movements that they made.

Q Did you go anywhere else?

A Just in the general Metropolitan area.

MR. LAVIN: May I have a moment, your Honor?

I have no further questions of this witness.

THE COURT: Mr. LaRossa? Any questions?

MR. LaROSSA: Yes, but may I pass up a note quickly to you,please?

THE COURT: Yes.

Let me see Exhibit 76 while Mr. LaRossa is writing that out.

(Document handed to the Court.)

THE COURT: Court's Exhibit 37 has been handed up.

(Court's Exhibit 37 marked.)

THE COURT: Go ahead, Mr. LaRossa.

(Government Exhibits 80, 81 and 82 marked for identification.)

THE COURT: There is no objection to the genuineness of Exhibits 80, 81 and 82, is there?

MR. LaROSSA: No, sir. I object to their

introduction but I do not contest the foundation.

THE COURT: All right. They are received against the defendant Benjamin Mallah, subject to connection as to him.

(Government Exhibits 80, 81 and 82 received in evidence.)

THE COURT: You may describe to the jury very briefly what they are; but briefly, please.

MR. LAVIN: Yes. Government Exhibit 80 is an indictment, 73 Cr 330, filed on April 13, 1973 charging Mr. Mallah and others with conspiracy to violate the federal narcotics laws.

Government Exhibit 81 is a docket for that indictment, 73 Cr 330, which indicates that the indictment was filed on April 13, 1973; and bench warrants were issued for all defendants. And it also indicates that a bench warrant was issued for Benjamin Mallah.

Government Exhibit 82 in evidence is a bench warrant issued April 13, 1973 for the arrest of Benjamin Mallah and it is on indictment 73 Cr 330, and the return is on August 17, 1973, and it is returned by David Samuel.

THE COURT: When the Government lawyer talks about "criminal," what he is talking about is that is the way they have the dockets, criminal dockets. 73 means 1973 criminal docket page so and so. That is what that reference is.

All right. Go ahead, Mr. LaRossa.

I have Court's Exhibit 38.

(Court's Exhibit 38 marked.)

THE COURT: I have already indicated the limited scope of Exhibits 80, 81 and 82, and those were the reference in the record will suffice and the contents are not going to be put before the jury other than as already indicated.

Go ahead.

MR. LaROSSA: Your Honor, I didn't get a chance to look at this Exhibit 81. I thought it was limited to the purpose, and in the offer I asked your Honor to look at this now to --

(Document handed to the Court.)

MR. LaROSSA: Your Honor, I didn't understand your Honor's ruling on that. Apparently you have cleared that up without me knowing it. Mr. Duke just informed me.

THE COURT: I think it is cleared up.

MR. LaROSSA: So do I. I didn't understand what your Honor said. I'm sorry.

THE COURT: Yes. That is for record purposes only and not for any other purpose.

CROSS-EXAMINATION

BY MR. LaRossa:

Q I show you what has been marked Exhibit 82. Have

you ever seen this before, sir?

A This is a Xerox copy of the arrest warrant which I returned.

Q What is the date on it, sir?

A It was returned on the 17th of August 1973.

Q No, the date of the arrest warrant.

A Issue?

Q Yes, sir.

A April 13, 1973.

Q 1973?

A That is correct.

Q So prior to that day, sir, there was no warrant out for Mr. Mallah, was there?

A Not to my knowledge.

Q And when you or any other agents received that on that particular day, you then attempted to find him to execute that warrant; is that right?

A That's correct.

MR. LaROSSA: May I approach the witness with this?

THE COURT: Yes.

Q Referring to Exhibit 78, sir, the top left-hand corner is a social security card. Right?

A Yes, sir.

Q For the name David Barton?

A Yes, sir.

Q Can you tell us whether or not you determined when that social security card was issued?

A No, we did not.

Q Was it issued prior to April 13, 1973?

A I have no idea.

Q Right underneath that is a rent receipt made out to David Barton, isn't it?

A Yes, sir.

Q And certainly that is before April 1973, isn't it?

A Yes, it is.

Q It is July 1972?

A That's correct.

Q At a time when this warrant was not in existence; is that right?

A That's correct.

Q The savings book, Home Federal Savings and Loan reflecting a $300 deposit -- I'm sorry, the Name David Barton-- what was the date of that deposit?

A May 16, 1972.

Q Prior to the date of that warrant being issued; isn't that right?

A Yes, sir.

Q What was the date of that operator's license?

A I believe it was issued May 17, 1972.

Q Almost a year before that warrant; right?

A Yes, sir.

Q There is another receipt based upon a lease commencing May 15, 1972 on that exhibit, isn't there?

A Yes, sir.

Q That is dated May 6, 1972?

A Yes, sir.

Q Some 11 months before that warrant was issued; is that right?

A Yes, sir.

Q Mr. Mallah let you in that night when you knocked at the door?

A Yes, he did.

Q Opened the chain?

A He opened the door.

Q Let you in?

A Yes, sir, he did.

Q You didn't use any force to place him under arrest, did you?

A No force was needed.

Q Didn't have to; right?

A No, sir.

Q Voluntarily submitted to you?

A Yes, sir.

MR. LaROSSA: Thank you. I have no further questions.

THE COURT: Any questions by any other defendant?

No questions.

Any redirect?

MR. LAVIN: Just one question.

REDIRECT EXAMINATION

BY MR. LAVIN:

Q At the time you made the arrest, did you announce who you were when you knocked on the door?

A Yes, we did.

Q How many agents were with you at the time?

A Four.

MR. LAVIN: I have no further questions.

THE COURT: All right. Thank you very much. You may step down.

(Witness excused.)

THE COURT: We will now take a recess until tomorrow morning at ten o'clock.

Again, please let me repeat what I said to you before, please don't discuss this case among yourselves and don't discuss it with anyone else. Keep an open mind on this case until you have heard all of the evidence and heard the charge of the Court, if any, in connection with the case,

which will set the ground rules for your consideration.

We sat a little later tonight than normally, and I beg your indulgence on that account.

I hope you have a restful evening. I'll see you here tomorrow morning on time at ten o'clock to start.

Good night.

(The jury left the courtroom.)

THE COURT: Mrs. Rosner, the jury is now gone. I am going to advise Mr. Kenny that the person that we discussed is no longer needed. Is that right?

MRS. ROSNER: Just one moment, your Honor.

Would it be possible to reserve decision on that matter until the a.m., and I will be able to advise the Court first thing in the morning?

THE COURT: All right. I will state on the record since it is in the absence of the jury the name of the individual so that you will have a record of who it is.

Herbert Sperling.

MRS. ROSNER: Thank you, your Honor.

THE COURT: Did you want to see me?

MR. LaROSSA: One thing, please.

THE COURT: Yes?

MR. LaROSSA: Would it be inconvenient for your Honor to rule on the questions that we discussed in the robing

room now, rather than wait until the end of the Government's case? If your Honor is going to accept the evidence, it means bringing a witness here.

THE COURT: It would not be inconvenient. Just tell me what you have in mind. Just hand up what you have in mind.

MR. LaROSSA: I don't have them written. I was going to orally read them into the record.

THE COURT: Why don't you write out what you have in mind and come down to my chambers with your material and then I can let you know and then place it on the record in the morning on the basis of what I tell you. Is that all right?

MR. LaROSSA: Fine; sure.

THE COURT: I will be there for about an hour, hour and a half.

MR. LaROSSA: May it be a little later, because Judge Carter is waiting for me.

THE COURT: I will be here until 6:30.

(Adjourned to Thursday, January 3, 1974, at 10:00 a.m.)

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WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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Mortimer Moriarty	1250	1256	-	
David Samuel	1258	1273	1277	-

EXHIBITS

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UNITED STATES OF AMERICA
v
BENJAMIN MALLAH et al. 73 Cr 881

New York, January 3, 1974
10:00 a.m.

(Trial resumed.)

(In open court; jury present.)

THE COURT: All right, Mr. Lavin.

MR. LAVIN: Your Honor, at this time I would like to read some stipulations to the jury.

THE COURT: All right.

MR. LAVIN: It is stipulated by counsel for the Government and counsel for the defendant Mallah that if Nancy O'Malley were called to testify, she would testify that she and Benjamin Mallah were together in Hallandale, Florida on April 15, 1973. There Benjamin Mallah told her he was going downstairs, and when he returned, Benjamin Mallah told Nancy O'Malley "There's been some trouble. I have to leave." And that after that, Benjamin Mallah then packed his bags and left Miss O'Malley's apartment in Hallandale, Florida.

MR. NESLAND: May the record reflect that I have marked two plastic lock-seal envelopes which I opened previously as Government Exhibit 58 for identification. I have removed the contents therefrom. I removed from there

four lock-sealed envelopes which were previously opened, which I have marked collectively as Government Exhibit 58-A for identification. And I have removed from Government Exhibit 58 for identification Government Exhibits 58-B, 58-C, 58-D, 58-E, 58-G, 58-G and 58-H for identification, all of which I have previously marked.

At this time I will read a stipulation:

It is stipulated and agreed between the Government and all defense counsel that Jack Fasanello, if called as a witness, would testify that on May 15, 1973, he accompanied agents to Room 38 and Room 46 at the Bar Harbor Motel in Massapequa, Long Island, and collected samples as follows:

From Room 38 at the Bar Harbor Motel, Government Exhibit 58-B for identification and Government Exhibit 58-C for identification. 58-B for identification are vacuum sweepings of two bedspreads, Government Exhibit 58-C for identification are vacuum sweepings of the perimeter of the rug and under the bed.

And that he put those samples from Room 38 of the Bar Harbor Motel into a lock-sealed envelope which he then locked and sealed.

That from Room 46 at the Bar Harbor Motel, he collected the following samples:

Government Exhibit 58-F for identification, which

were sweepings from the bedspread, and Government Exhibit 58-G for identification, which were vacuum sweepings of the perimeter of the rug and under the bed in Room 46. And that he put Government Exhibits 58-B and C and Government Exhibit 56-F and G into lock-sealed envelopes which he then locked and sealed.

And that on May 30, 1973, he performed an analysis on the samples with the following results:

From Room 38 at the Bar Harbor Motel, Government Exhibit 58-B for identification was found to contain traces of heroin. Government Exhibit 58-C for identification, from the same room, was found to contain traces of marijuana and traces of heroin.

From Room 46 of the Bar Harbor Motel, Government Exhibit 58-F for identification contained no controlled substances, and Government Exhibit 58-G for identification was found to contain traces of marijuana and traces of heroin.

And that he thereafter placed Government Exhibits 58-B and C, and Government Exhibits 58-F and G for identification into lock-seal envelopes which he subsequently opened and thereafter he placed Government Exhibit 58-B and C for identification, Government Exhibit 58-F and G for identification, into another lock-sealed envelope that was

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locked and sealed.

At this time the Government would move to --

THE COURT: Just a minute, please. I have Court's Exhibit 39.

(Court's Exhibit 39 marked.)

THE COURT: Go ahead. I just want to record the fact that I have it.

MR. NESLAND: At this time the Government would move into evidence Government Exhibits 58-B for identification, C for identification, 58-F and 58-G for identification.

MR. MITCHELL: Objection.

MR. DUKE: Objection.

MR. LaROSSA: Objection.

MR. PELUSO: Objection.

THE COURT: The sweepings analyses are received subject to connection.

Would you give me again the date? I think you said they were analyzed on May 30?

MR. NESLAND: Yes, your Honor.

THE COURT: All right.

(Government Exhibits 58-B, 58-C, 58-F, and 58-G received in evidence.)

MR. NESLAND: May the record also reflect that

I have in my hand a lock-sealed plastic envelope which I have previously opened and marked as Government Exhibit 59 for identification. I have removed the contents therefrom, which were two lock-sealed envelopes which were opened and which I have marked Government Exhibit 59-A for identification. I have also removed therefrom four plastic lock-sealed envelopes which I have marked Government Exhibit 59-B for identification, 59-C for identification, 59-D for identification, and 59-E for identification.

The stipulation with respect to them, may I read it to the jury?

THE COURT: Yes.

MR. NESLAND: Mr. Fasanello would further testify that on May 1, 1973 he vacuum-swept and obtained sweepings from a rubber mat in the trunk of a brown Mercedes, License No. LM 6530, and that he put those samples contained in four Whirlpak bags, Government Exhibits 59-B for identification, 59-C for identification, 59-D for identification, and 59-E for identification, in a lock-sealed envelope which he locked and sealed. That he performed an analysis on the sweepings on May 7, 1973, and found the sweepings taken from the rubber mat in the trunk of the car to contain traces of heroin, and that he put that Whirlpak bag into a lock-sealed envelope along with the other three Whirlpak bags

containing sweepings from other parts of the car which he then locked and sealed.

At this time the Government moves for Government Exhibits 59-B, C, D, and E for identification into evidence.

THE COURT: Have we identified the Mercedes-Benz in the record heretofore?

MR. NESLAND: Pardon?

THE COURT: Have we identified the Mercedes-Benz in the record heretofore?

MR. NESLAND: Mr. Stromfeld testified to it other than the license plate, your Honor.

THE COURT: What is there in the record that connects the Mercedes-Benz to that license plate which identifies this particular car in the record?

MR. LAVIN: Your Honor, I don't believe there is a connection as far as the license plate. There is a connection as far as the car itself. I would wonder if counsel --

THE COURT: Are you offering anything in evidence?

MR. NESLAND: Just the sweepings from that car.

THE COURT: Yes. You are offering it in evidence?

MR. NESLAND: Yes.

THE COURT: What do the defendants say about that?

MR. MITCHELL: Objection.

MR. LaROSSA: I am writing something out, if I may.

MR. DUKE: I object.

THE COURT: Is the objection based in any way on the identification of the car, or is it a general objection?

MR. LaROSSA: This is very specific, if I may just have a moment, please.

THE COURT: What I want to know is whether anybody claims that there is a gap in the proof as to this particular car.

MRS. ROSNER: Your Honor, I object to that basis and as an additional ground --

THE COURT: You do object on that basis?

MRS. ROSNER: Yes.

THE COURT: We will keep them marked for identification for the moment.

MRS. ROSNER: There is an additional ground which may obviate the problem, your Honor, if Mr. LaRossa can send a note up to the Court.

MR. NESLAND: Your Honor, while they are writing the objection, may I read another stipulation in evidence?

THE COURT: Yes.

MR. NESLAND: It is stipulated and agreed between the Government and all defense counsel that if called as a

witness, Frederick Martorell would testify as follows:

That he is employed by the Drug Enforcement Administration as a forensic chemist and is fully qualified to analyze material believed to contain controlled substances; that on February 15, 1972, he received Government Exhibit 56-D for identification in a locked and sealed envelope, and it was in a locked and sealed conditions, and that Mr. Martorell opened it and removed two double plastic bags, each containing a quantity of white powder, Government Exhibit 56-E for identification and Government Exhibit 56-F for identification, and that he performed an analysis on the white powder found in Government Exhibit 56-E for identification and found it to contain 477.50 grams of 53.72 percent heroin hydrochloride; and that he found Government Exhibit 56-F for identification to contain 462.5 grams of 54.05 percent heroin hydrochloride. And that after completing his tests, he returned Government Exhibit 56-E for identification to the lock-sealed envelope, Government Exhibit 56-B for identification, and he returned Government Exhibit 56-F for identification to another lock-sealed envelope, Government Exhibit 56-C for identification.

And that on June 27, 1973, Government Exhibit 56-B for identification and Government Exhibit 56-E for identification were opened, and thereafter Government Exhibit 56-E

and 56-F were placed into Government Exhibit 56 for identification, a lock-sealed envelope.

Mr. Martorell would further testify that he performed an analysis on the following exhibits with the following results:

Government Exhibit 41-A for identification, the finding was manite.

Government Exhibit 43-B for identification, the finding was lactose.

Government Exhibit 44-B for identification,the finding was lactose.

Government Exhibit 45-B for identification, the finding was lactose.

Government Exhibit 46-B for identification, the finding was lactose.

Government Exhibit 47-B for identification, the finding was manite.

Government Exhibit 48-B for identification, the finding was lactose.

Government Exhibit 49-B for identification, the finding was manite.

Government Exhibit 50-B for identification, the finding was manite.

Government Exhibit 51-B for identification, the

finding was lactose.

Government Exhibit 52-B for identification, the finding was lactose.

Government Exhibit 53-B for identification, the finding was lactose.

And that lactose and manite are non-controlled substances commonly used as diluents for heroin and cocaine.

At this time the Government would move into evidence Government Exhibits 56-E and 56-F for identification.

MR. MITCHELL: Objection.

THE COURT: What does the record show as to the source of those exhibits, 41, 44, 45, 46, 47, 48, 49, 50 through 53?

MR. NESLAND: Those were seized from the trunk of Mr. Conforti's car when he was arrested.

THE COURT: The objection is overruled. They are received subject to connection.

With regard to the specific objection set forth on Court Exhibit 40, Mr. LaRossa, which is joined in by Mr. Duke, I do not regard the ruling you mentioned as applicable to the particular offer of sweepings, and the ruling as to the gloves was sustained on an entirely different ground. Consequently, if there is no issue as to whose Mercedes-Benz it was, I will receive the results of the stipulation subject

to connection.

MRS. ROSNER: I would withdraw that objection, your Honor.

THE COURT: In other words, you are not questioning as to whose car it was?

MRS. ROSNER: No, I am withdrawing the objection for lack of connection.

THE COURT: All right.

MRS. ROSNER: I should say lack of proper foundation.

THE COURT: All right. The exhibits may be deemed marked in evidence accordingly, subject to connection.

MR. LAVIN: Your Honor, the Government would like to pass to the jury the exhibits that were received in evidence and which they haven't seen.

THE COURT: What exhibits?

MR. LAVIN: Photographs. Some of the items seized.

THE COURT: Start the photographs going. You are not planning to hand them all the equipment, are you?

MR. LAVIN: No, just --

THE COURT: I don't know how good the light is down there and whether this light will do anybody any good. I have a long extension cord. If anybody wants it they can

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have it.

Mr. Lavin, what was the first name of O'Malley?

MR. LAVIN: Nancy.

(Pause.)

(Court's Exhibit 40 marked.)

(Government Exhibits 56-E and F received in evidence.)

MR. LAVIN: Your Honor, I have a note I would like to pass to the Court. I would like to hand it to defense counsel.

(Document handed to defense counsel.)

MR. LAVIN: Your Honor, may I hand this to the jury?

THE COURT: What are those?

MR. LAVIN: These are other exhibits. May I briefly describe them, just what they are?

THE COURT: Just let them go to the jury and let them see for themselves.

(Additional exhibits handed to the jury.)

(Pause.)

THE COURT: Now, apparently at the time when this large number of exhibits were handed to the jury, I am advised that a piece of paper was caught amongst the pictures shown to the jury, and that one of the jurors handed that

piece of paper back to Mr. Nesland. On the back of the piece of paper there seems to be a note that I wrote when I requested yesterday a photostatic copy of a paper that a witness was using, and I said I wanted a photostatic copy of Government Exhibit 3561.

On the front of the piece of paper there is a reference to Epsom salts and there is some comment by somebody. All I have to tell you is this, and I have told it to you repeatedly during the trial: What you learn from the witness stand is evidence in the case, and what you learn from the well or from anybody else inadvertently or advertently has no bearing whatsoever, and is to be erased from your minds. It has no application to this case whatsoever. We are not interested in any aspect of it, and I instruct you to disregard it in all respects, the same way as exclamations or inadvertent papers or whatever gets before you.

You must bear in mind that the only thing that controls in this case is what you have heard from the witness stand and the exhibits that have been received in evidence.

Mr. LaRossa has handed up a series of questions which I have marked Court's Exhibit 42, which will be referred to hereafter in connection with a matter that has been reserved for further consideration.

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(Court's Exhibits 41 and 42 marked.)

THE COURT: The memorandum sent up by Mr. Mitchell has been marked Court's Exhibit 43, and I will annex to it the slip of paper that is referred to, and file it as Court's Exhibit 43.

(Court's Exhibit 43 marked.)

MR. LAVIN: Your Honor, would you mark mine, the note I sent up with the slip?

THE COURT: Is this your handwriting?

MR. LAVIN: Yes, it is.

Your Honor, I'm sorry, I didn't sign it. That is my writing. I sent the slip up.

THE COURT: Just put your name on it so that it is identified.

Mr. Mitchell, have you seen the note that Mr. Lavin sent up? Just come up and look at it.

(Paper handed to Mr. Mitchell.)

THE COURT: I am making it all together.

MR. MITCHELL: Together, your Honor?

THE COURT: Yes.

All right, the motion in Court's Exhibit 43 is denied.

What is the next order of business, Mr. Lavin?

MR. LAVIN: Your Honor, at this time, the

Government rests.

THE COURT: Government rests.

All right, ladies and gentlemen, we will give you your usual mid-morning recess now for about ten minutes.

(The jury left the courtroom.)

THE COURT: The Government has rested.

MR. LaROSSA: If it please the Court, I move on behalf of Mr. Mallah under Rule 29 for a judgment of acquittal. I would like with the Court's permission to direct myself to Counts 5, 6 and 7 initially.

THE COURT: Before you go any further on that, would you permit an interruption?

Mr. Lavin, what is the evidence in the case on Counts 5, 6 and 7?

MR. LAVIN: The evidence in the case on Counts 5, 6 and 7 is that Lipsky, when he was delivering narcotics to those areas merely saw Mr. Mallah, saw him in conversation with Mr. Pacelli. However, the Government's argument, we are submitting a request that he not be considered as actually possessing or distributing or even as an aider or abettor, but that he be charged with those counts because he was a member of the conspiracy, the Pinkerton charge.

THE COURT: All right, that narrows the area of your argument now, Mr. LaRossa.

MR. LaROSSA: Your Honor, may it please the Court, there is no evidence with respect to Mr. Pacelli and Mr. Mallah that I know of. I don't know what Mr. Lavin is referring to, but I do not recall any witness testifying as to a conversation between Mr. Mallah and Mr. Pacelli; so I think that to start at that point, even, may it please the Court, under Pinkerton, there is absolutely no evidence that in July 1971 Mr. Mallah was anywhere near any transactions involving narcotics.

THE COURT: What is your motion with respect to Counts 5, 6 and 7?

MR. LaROSSA: To dismiss.

THE COURT: Motion granted.

MR. LaROSSA: Now, may I refer myself to Count 1, your Honor. Do you want an interruption at this point as well or do you want me to go through the evidence as I see it?

THE COURT: No, I think you had better discuss the evidence on Count 1.

MR. LaROSSA: On Count 1, your Honor, to take each of the witnesses --

THE COURT: I would suggest that you be very brief because I have digested and have a very clear recollection of the evidence, and I don't need it recounted in detail. Just give me your legal argument in respect to it.

MR. LaROSSA: Do not recount the evidence?

THE COURT: I don't think it is necessary.

MR. LaROSSA: Your Honor, I submit to you that there is no evidence in the record as to Count 1 that Mr. Mallah engaged in the conspiracy as charged in the indictment to possess or distribute or possess with intent to distribute Schedule I or Schedule II narcotic drugs.

Your Honor knows full well, I am sure, that presence at a scene without anything else is insufficient as a matter of law. Now, the Government has introduced in more than one occasion what I consider to be narrative hearsay. For example, one co-conspirator telling another co-conspirator that Mr. Mallah is Sperling's partner.

I think that under the decisions in this circuit, the Government must prove that Mr. Mallah's acts and declarations are sufficient to establish his involvement in the conspiracy, and that is what this case lacks. There is no proof that Mr. Mallah had anything to do with heroin, knew the existence of heroin, nor had anything to do with money that either was derived from the sale of heroin with his knowledge, or participated in the purchase or distribution of heroin..

Now, certainly there is information -- there is evidence in the record that indicates that he had conver-

sations with Sperling. I refer basically to the Lino testimony.

But I submit to the Court that that can be interpreted in any number of ways, and it is not sufficient in and of itself to establish Mr. Mallah's participation in the conspiracy.

There is nothing else in this record other than that one conversation where Mr. Lino is acting in surveillance that establishes Mr. Mallah's participation in this conspiracy.

Getting back to that conversation, the only word that was used that in any way can refer to narcotics is "stuff." And I submit to you that your Honor, taking the entire testimony into account,must recognize the fact that that word in and of itself is subject to many interpretations, as the witness stated. And to establish a conspiracy based upon that one word, I submit to the Court, is error.

THE COURT: After a thorough reading of the record and careful consideration of its implications, I believe that there is sufficient proof in the record from which a jury could find beyond a reasonable doubt that Mr. Mallah was a member of the alleged conspirary. The motion to dismiss Count 1 is denied.

Defendant Pacelli?

MR. DUKE: Your Honor, I would at this time like to renew my motions filed previous to the trial to dismiss the indictment, and also the motion for a severance I would like to renew at this time. And I would move to dismiss Counts 5, 6 and 7, on the ground that they charge Pacelli and Mr. Mallah with joint possession and distribution, and since the count has been dismissed as to Mallah, as manifested in the proof as well there was no joint concerted distribution or possession, and therefore Couts 5, 6 and 7 fail as to Pacelli as well.

I would also move to dismiss Count 4 because I don't recall any evidence being offered in support of Count 4. The bill of particulars refers to some transaction in yellow fingers. The count refers to Defendant Pacelli, Perez and Ramirez, two kilos of heroin. My notes don't indicate that there was any testimony to support that.

THE COURT: What about Count 4, Mr. Lavin?

MR. LAVIN: The Government has submitted no proof to that count, your Honor.

THE COURT: Count 4 is dismissed.

MR. DUKE: I would also submit Count 1 on the similar gounds that Mr. LaRossa raised, but I would just point out that there is no evidence in the record concerning

any conspiratorial activities on the part of Mr. Pacelli subsequent to February 1972. I think it is undisputed that Mr. Pacelli has been in jail since that period of time.

THE COURT: What date did you say?

MR. DUKE: February 1972.

Mr. Lipsky testified that he hadn't seen him or talked to him -- or hadn't talked to him, and had no knowledge of any illegal activities subsequent to February of 1972.

It seems to me that while it is possible for a conspirator who has been arrested and in jail to continue in the conspiracy, Krulewich strongly suggests that the presumption of continued membership is at least -- at least evaporates at the point where one of the conspirators is jailed, and some affirmative evidence is necessary to show continued participation, and there is none in this record.

I would further point out that there is no evidence of any relationship between Mr. Pacelli and most of the people named in the indictment and the bill of particulars, such as Defendant Barrett, Conforti, Peter Salanardi, Courtland Sample, Jack Spada and a number of others. There is simply no connection whatsoever between Defendant Pacelli and those alleged co-conspirators.

So while it is possible that the jury might infer a conspiracy between Mr. Pacelli and Mr. Lipsky, Susan Weyl,

and perhaps others, they could not on this record find a conspiracy that extended into 1972 and 1973 and included the parties named in the indictment. And therefore under Kodiakus, it seems to me plain --

THE COURT: What evidence is there at this stage of the record that any alleged co-conspirator withdrew other than the fact that he was arrested?

MR. DUKE: In terms of a withdrawal, none. On the other hand, it is not the law that one must affirmatively withdraw. That is one form of ending your participation, but you can simply fail to participate. There has to be -- in other words, there is a presumption that the Government presumably relies upon that once in a conspiracy, you remain in a conspiracy.

THE COURT: Isn't that the law?

MR. DUKE: What I am saying is that that presumption

THE COURT: I say isn't that the law?

MR. DUKE: That is the law, but that presumption is destroyed when one of the conspirators is put in jail. That is my argument, and I know of no clear law one way or the other, but the common sense of the matter, and the Krulewich doctrine would suggest that that is the case.

There is certainly no evidence that -- the testimony indicates that a lot of people engaged in these

activities in '72 and '73. There is no evidence that they engaged in them in 1971, so there is no evidence that Mr. Pacelli could have conspired with these other people.

THE COURT: The motion to dismiss Counts 1, 2, 3 5, 6 and 7 is denied. The jury could find beyond a reasonable doubt the existence of the alleged conspiracy, that the defendant Pacelli was a member thereof, and that the possession with intent to distribute or actual distribution referred to in the substantive counts occurred.

MR. DUKE: Your Honor, there are also two items in Count 1 I move to strike, overt acts in 1 and 7. I don't believe there is any evidence to support either of those allegations.

THE COURT: What do you say to that, Mr. Lavin?

MR. LAVIN: May I look at the indictment a minute? I seem to have left mine downstairs.

(Document handed to Mr. Lavin.)

THE COURT: Overt Act 1 is bound up with Count 4, and I have dismissed Count 4.

MR. LAVIN: Right. There is no proof on Overt Act 1.

THE COURT: The motion to strike Overt Act 1 is granted.

MR. LAVIN: 7, your Honor.

THE COURT: Yes?

MR. LAVIN: Yes, I believe there was testimony by Mr. Conforti that in January 1973 at the Skyline Motel he and Spada mixed approximately two and a half --

THE COURT: I think that there was evidence in the record on that, Mr. Duke.

MR. DUKE: All right.

THE COURT: Defendant Catino?

MRS. ROSNER: Your Honor, if I may take the two counts in inverse order beginning first with the second count of the indictment, I would move for a judgment of acquittal pursuant to Rule 29 on the following ground, your Honor:

Taking the evidence on that transaction, the September two-kilo transaction, in the light most favorable to the Government, all the record reveals is that Lipsky -- and I am referring now to the non-hearsay evidence which is admissible under that count -- all that the record reveals is that Lipsky accompanied Pacelli to that club, and saw Catino hand him a set of car keys and a registration. After that time, all acts took place outside of Catinos' presence. There is no proof as to the ownership or registration of the vehicle so that the Government might establish custody or effective control of the narcotics left in that car

through Catino's ownership of the vehicle. The only act attributable to him under the non-hearsay evidence admitted under that count is the act of giving car keys and registration. There is no proof of ownership of the car. There is no proof of delivery of the narcotics to him.

Lipsky leaves the club before the keys or registration, if they ever were, were transferred back. And I submit that under the non-hearsay evidence, the mere act of giving car keys and registration without further proof as to ownership or control of the vehicle is insufficient to support a substantive count of possession of narcotics left in that vehicle.

THE COURT: Well, you have started out using the word "ownership." And you have wound up using the words "and control."

MRS. ROSNER: Custody or control, your Honor. It is not made out because there is no proof that the keys or registration of the vehicle were ever delivered back to Catino. Certainly, custody and control of the vehicle, when it was -- when no narcotics were present in it, isn't probative under the count. And after narcotics were present in the car, there is no proof that he ever regained custody or control of the car or that he owned it. There is simply no proof of delivery or possession, your Honor.

I think the testimony in regard to this count is contained in two pages which are marked in my transcript 118 and 119, and I see nothing in it, your Honor, on the non-hearsay evidence, that would support a charge of possession.

THE COURT: Well, there were more pages than you have found.

MRS. ROSNER: Not with respect to that count, Judge. Not with respect to the two-kilogram count. There is further evidence in the record of a delivery of cocaine sometime during the fall, but that certainly has nothing to do with the specific charge in Count 2 of possession of two kilograms of heroin, and the testimony in that regard, admissible under that count, disregarding hearsay, is simply insufficient, your Honor, to show delivery or custody and control of Mr. Catino.

THE COURT: Yes, there is further testimony than you have at the moment located.

What else?

MRS. ROSNER: If your Honor would allow me, I think I tried to go through the testimony and isolate all references to that count, and I would like the opportunity to look. There are only ten pages of testimony referring to Mr. Catino on direct.

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THE COURT: I have read those ten pages so you won't have to trouble yourself.

MRS. ROSNER: If the Court could direct me to the other items of evidence that you are making reference to.

THE COURT: It is in the general area starting at page 108. That would be the record, and going all the way through. And the evidence is sufficient under all the facts and circumstances of this case. And in consideration of the alleged conspiracy, to sustain the substantive count, and a jury would be in a position to find beyond a reasonable doubt the membership of this defendant in the alleged conspiracy, and the transaction asserted in Count 2.

MRS. ROSNER: May I say this, your Honor, just so that my record is complete. I don't think that the Pinkerton theory applies to Count 2 here because I think there is a basic problem of proof of the crime charged in Count 2. I don't think it is a situation where the crime has been proved, but my defendant did not directly participate but is because of the act of co-defendants.

THE COURT: I understood that is your initial argument. That is the one I am not in agreement with you on.

MRS. ROSNER: With respect to the conspiracy count, your Honor, I think the evidence taken in the light most favorable to the Government demonstrates two occasions when

Mr. Catino supposedly bought narcotics from what we might term the hub conspirators. And I think under the case law of this circuit, isolated transactions, purchases of narcotics, without more, are in and of themselves insufficient to show participation in a conspiracy, referring to such cases as Ah Kee Eng and United States v. Aviles, United States against Stromberg, Koch, and a host of other cases.

THE COURT: The law is clear, and you have correctly cited it, but it doesn't apply. Motion to dismiss is denied.

Defendant DeFranco?

MR. PELUSO: If it please the Court, at this time I move pursuant to Rule 29 for judgment of acquittal on each of the counts, Count 1 and Count 3, of this indictment on the ground that the evidence is insufficient to sustain a conviction as against the defendant DeFranco.

With regard to the conspiracy count, I would adopt the arguments made by co-counsel, Mrs. Rosner. I think they are applicable here.

With regard to the substantive count, I believe we have testimony of two occasions involving the defendant DeFranco at a club. Testimony by Barry Lipsky where on one occasion, the first occasion, a set of keys were given to Mr. Lipsky, according to his testimony, by Mr. Pacelli.

He left, went to a car, a white Cadillac, was unable to state whether or not the registration was belonging to the defendant or give a license plate number. He then returned and parked the car, returned to the club, and his testimony was that he returned the keys on that occasion to Mr. Pacelli.

On the second occasion, he again took a car, left, and returned the keys to Mr. Pacelli. There is a question of money on one of the occasions, $5500 in an apartment above a club, the testimony being that there was a conversation between Mr. Lipsky and Mr. Fazzalari or Fuzzy that "nobody is downstairs, come up to the apartment and get the money."

Once again there was no conversation between Mr. Lipsky and Mr. DeFranco.

Mr. DeFranco, according to Mr. Lipsky's testimony, was at the apartment at the time that the money was turned over.

THE COURT: Anything else?

MR. PELUSO: Nothing further.

THE COURT: The motion to dismiss Counts 1 and 3 is denied.

The jury could find beyond a reasonable doubt that the defendant DeFranco was a member of the alleged conspiracy, and participated as charged in Count 3.

Defendant Barrett?

MR. MITCHELL: If your Honor pleases, before I make my motion, I move to strike from the record that part of Conforti's testimony in which he alleges that he was told by Spada that Spada had been placed in an embarrassing position in a parking lot in relation to Barrett. The basis for my motion is it is narrative hearsay, but of a more peculiar kind than we ordinarly encounter in the average case.

Had Spada remained a fugitive until Conforti testified, I would not be in a position to say that since he is a fugitive I could call him as a witness, but unfortunately for Mr. Spada, Mr. Spada is dead, and he died before Mr. Conforti testified.

THE COURT: What do you say this conversation was that you want to strike? Have you got the transcript here by any chance?

MR. MITCHELL: I can give you the page. I believe it is page 35 of Conforti's testimony.

THE COURT: Here.

That page doesn't relate to a parking lot. It talks about a conversation with Mr. Barrett in a bar at the Stage Delicatessen.

Wait a minute, there is in front of that, there is

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talk about a parking lot.

MR. MITCHELL: Yes.

THE COURT: Have you got that reference, Mr. Lavin?

MR. LAVIN: Yes, I do, your Honor.

THE COURT: What is the answer to -- your answer to the question of narrative hearsay in that respect?

MR. LAVIN: Well, I think Mr. Spada is telling Mr. Conforti, certainly the part about delivering the two and a half kilos to a customer, is not narrative hearsay. It is a statement, and I think the rest is just explanation.

THE COURT: Have you got the entire page in front of you, Mr. Mitchell? Take this copy.

(The Court hands transcript to Mr. Mitchell.)

THE COURT: Read right down from the top, Mr. Mitchell. I think you will find that right from the top -- you will find that what you consider narrative hearsay, that there is some narrative interspersed in otherwise admissible evidence. It appears in part in one answer and in part in another answer. Since it is so inextricably intertwined with what I consider appropriate evidence, I will deny your motion to strike.

MR. MITCHELL: Your Honor, I also move to strike the testimony of the witness Pope in its entirety, as setting forth a transaction which from my understanding of

the alleged conspiracy, is an isolated thing which has nothing to do with the conspiracy, and hasn't been connected up in this case.

THE COURT: In that connection you have evidence of matters relating to Paul Carter and to Mark Reiter. Why do you say that that is not evidence in the general order of what the Government is trying to prove here?

MR. MITCHELL: Well, there is no connection, I say.

THE COURT: No connection?

MR. MITCHELL: No connection. Just a reference, but that's all there is. I think what happened was that the Government having used Mark Reiter at the last trial didn't use him here and fell into its own trap and didn't complete a picture.

THE COURT: Well, I think there is just a little more than that, but what about Mr. Pope's testimony as it stands in this record?

MR. LAVIN: First of all, Mark Reiter never testified at any trial.

MR. MITCHELL: I thought he did.

MR. LAVIN: Well, I think the evidence showed that first of all Mileto was involved in selling narcotics prior to this sale by Pope. Pope observed Mileto in a brown Skylark delivering the narcotics to Carter, and

Reiter, and Agent Stromfeld sees Mileto, arrests him right after the sale, lying down in his car. Cecile Mileto testifies that right after that sale she was with Herbert Sperling and Herbert Sperling was chewing Mileto out for selling drugs, and it is coming off your end. Joey Conforti testifies that the night of that sale he gets arrested. Zelma Vance testifies she is in the apartment and right after that Conforti takes all the stuff out and brings it down to Goldstein in 57th Street, goes back and gets the rest of the equipment and brings it down to a hotel the following day.

THE COURT: I think his participation offers room for reasonable inferences to be drawn. Motion to strike Pope's testimony is denied.

MR. MITCHELL: Now, your Honor, under Rule 29 I move for a judgment of acquittal and I am going to adopt Mrs. Rosner's argument as far as it applies to the defendant Barrett. If he were in any transactions, and you have to take the alleged transactions in the light most favorable to the Government, they are isolated. There was a period I believe, taking all of the testimony of Conforti, Williams, and the hearsay on Spada, all between late November and December, completely -- of '72, just, I believe, two isolated transactions.

THE COURT: Motion is denied. The jury could find beyond a reasonable doubt that Mr. Barrett was a member of the alleged conspiracy.

Now, that brings us, I think, to the next order of business.

Mr. LaRossa offered up some questions here. I take it that you are not offering to produce Sam Kaplan as a witness to the tape; is that right?

MR. LaROSSA: No, sir, that is not Sam Kaplan. That is an independent third party.

THE COURT: Let me get the setting for your question here so that we have at this point in the record what it is you are asking the ruling on.

You have marked an alleged tape of an alleged conversation between Conforti and allegedly Sam Kaplan, and that has been marked, my recollection is it is Exhibit Q.

Then you had your office, as I understand it, prepare a transcript which you believe is accurate in all material respects and that has been marked Exhibit Q-1; is that right?

MR. LaROSSA: That is correct.

THE COURT: The one thing I am not clear about, are you claiming that the date which was placed at the top of that transcript is the date that appears on the tape-

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recording itself? The date October 28?

MR. LaROSSA: Within the recording itself?

THE COURT: Yes.

MR. LaROSSA: You mean is there a conversation between the participants that leads us to believe that is the date?

THE COURT: Is there anything on the date that says October 28?

MR. LaROSSA: No, sir, there is only one reference and that's when Mr. Kaplan says, allegedly, that "I have to appear before Judge Travia in the Eastern District next week," which is November 5th. That is about as close as we get to that.

THE COURT: Well, there is far closer intimation about dates in the record, but that is neither here nor there.

MR. LaROSSA: I'm sorry, I don't understand that.

THE COURT: What I am trying to get at is that you have handed in to the Court and to the parties the transcript prepared by your office, and what I am asking you is the information the rubric at the top, quote, "Conversation between Joseph Conforti, Sam Kaplan, October 28, 1973," supplied by your office are not contained on the tape? Those words, and that date, are they supplied by whoever typed up the manuscript or are they a reproduction of words

on the tape?

MR. LaROSSA: No, sir, they were supplied by my office without reproducing the tape.

THE COURT: You propose, if I understood why you handed up these questions, at my request, in fact, to call a witness to -- let me put it the other way -- what substantive issue are you going to attempt to establish in respect to a witness concerning that tape?

MR. LaROSSA: I am going to prove that the date was October 28.

THE COURT: How would that bear on any substantive issue in this case?

MR. LaROSSA: It bears on the issue that the witness Conforti states that approximately -- that sometime subsequent to the phone call to Mr. Kaplan, that was the subject of the cross-examination, he spoke to Mr. Spada.

THE COURT: You wish to contradict him on that subject?

MR. LaROSSA: Yes, sir.

THE COURT: How does that bear on any substantive matter in this case?

MR. LaROSSA: Mr. Spada, as your Honor knows, is a co-conspirator in this case. There are allegations that Mr. Spada mixed heroin with the witness Conforti, delivered

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heroin with the witness Conforti, and further, delivered heroin that he received from Mr. Sperling to Mr. Kaplan at a hospital bedside.

I submit to you that that bears on the conspiracy as alleged by the Government. We have the absolute right to go into it, not as a collateral matter, I might add.

THE COURT: What are the outermost limits of the conspiracy as alleged in the indictment?

MR. LaROSSA: From the first day -- the dates, you mean, sir?

THE COURT: Yes.

MR. LaROSSA: From the 1st day of January up to -- 1971 -- up the filing of the indictment, which I believe in this case is August of -- July or August of 1973.

I think Mr. Lavin has that exact date. I don't know what --

THE COURT: At all events, the Government --

MR. LaROSSA: If I may, the witness testified I believe that it was 1971.

THE COURT: The Government has not -- the Government's superseding indictment was filed on September 20, 1973. The alleged conversation that we are discussing now occurred on October -- in October, or, you say, on October 28, 1973, so you can't draw any strength from any allegation

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of conspiracy. There is no allegation of conspiracy beyond September 20, 1973.

MR. LaROSSA: That is correct.

THE COURT: And furthermore, whether or not Mr. Conforti had a conversation with Mr. Spada, after his first conversation or his conversation with Mr. Kaplan, is an extraneous matter having no relationship at all to any substantive issue in this case, and not the subject of contradiction by collateral extrinsic evidence.

The thing that troubles me more than anything else is that we have here one party to the conversation. The other party to the conversation is not being offered but some substitute is being offered, and the only -- basically we can deal only with a date, and that date is of no significance whatsoever in this litigation.

MR. LaROSSA: May it please the Court, you have identified him as a substitute, and I think quite unfairly.

THE COURT: What?

MR. LaROSSA: I think you have identified the witness as a substitute to the conversation, and I don't think that is completely true. This witness spoke to Mr. Conforti and it is on the tape.

THE COURT: Is this the unknown man?

MR. LaROSSA: Yes, sir.

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THE COURT: All right, the unknown man appears in two questions right at the start. First of all, I don't know why he was characterized as unknown, considering the context, but that is a matter of curiosity with which I have no concern. But he certainly was not a part and party to the conversation. Therefore, all that he can talk about is the date. He can't talk about the conversation per se.

MR. LaROSSA: Well, there is one thing that certainly would solve that, your Honor. On the defendant's case I now offer in evidence the tape and the transcript as affirmative evidence, as the best proof of what was said on that occasion.

MR. LAVIN: I am really at a loss, your Honor, to understand -- well, Mr. LaRossa is talking about a conspiracy and these people were involved. Mr. Conforti has admitted the conversation, admitted the dealings with Kaplan.

THE COURT: There is only one subject matter. He has offered now on the defendant's side of the case the tape and the transcript.

MR. LAVIN: To prove the date of the conversation so that it be argued to the jury that Mr. Conforti --

THE COURT: Are you consenting or objecting?

MR. LAVIN: I am objecting, your Honor.

THE COURT: The objection will be sustained, and

I have marked as Court's Exhibit 42 your proposed questions to this person.

The clerk will retain the transcript and the tape and have it placed in the vault for availability for the Court of Appeals if the case reaches them.

MR. MITCHELL: Your Honor, on behalf of the defendant Barrett, I would like to call your Honor's attention that the defendant Barrett is directly affected by the admissibility of the date because the question of whether Conforti is telling the truth about any conversation with Spada becomes material in the case of my defendant in the sense that, as your Honor knows, by page 35 of Conforti's testimony, the question arises, did Conforti ever hear such a thing or is he making it up? And an ability on my part to show that Conforti was lying about a conversation with Spada would be material.

THE COURT: I think that that goes to the heart of the legal question that is involved, and your suggestion respectfully is overruled.

MR. DUKE: Your Honor, may the record show Defendant Pacelli joins in the offer in Court's Exhibit 42?

THE COURT: All right.

MR. LaROSSA: May I just, so that my offer of proof is complete, your Honor, state that had your Honor

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admitted the evidence that has been offered, my next offer would be to offer the autopsy information that we received through the Court from the Government, indicating the date of Mr. Spada's death, which I submit is prior to the evening of the 28th day of October 1973.

THE COURT: I have that in mind, also.

MR. MITCHELL: Your Honor, I would now move to admit the data in the autopsy report on behalf of the defendant Barrett so that I can argue properly to the jury that Spada being dead leaves Conforti in a position where he can say anything he wants about what a dead man told him.

THE COURT: Has there been any evidence in the record otherwise that Spada has died?

MR. MITCHELL: No, your Honor.

MR. LAVIN: No.

THE COURT: I will think about that. I certainly wouldn't let you have the autopsy report.

MR. MITCHELL: No, I don't want --

THE COURT: Because either you get it all or you get none, and I am positive you don't want it all.

MR. LAVIN: Your Honor, there is also evidence in this record that Louis Mileto has conversations about these defendants. He is dead. Carlo Lombardi also made deliveries. He is dead. You know, I don't see what one

more body makes in this case, really.

THE COURT: Let me think about it and find out just how far the ramifications of this passing out go.

MR. LaROSSA: Does your Honor's ruling remain the same with an offer of proof that Mr. Kaplan be the witness instead of the third party?

THE COURT: What would you propose to elicit from Mr. Kaplan?

MR. LaROSSA: The date.

THE COURT: The date of what?

MR. LaROSSA: Of the conversation with Mr. Conforti.

THE COURT: As to that, I would rule that, on objection, would be sustained.

MR. LaROSSA: He would also identify the voice, naturally, as being that of Mr. Conforti, as would the other witness, I submit, who would know the voice, and he would testify to the authenticity of the tape in an attempt to introduce the tape into evidence.

THE COURT: All right. That can all be before a higher court if it ever gets to such a posture, and in the meantime, as I say, it is safeguarded and kept.

MRS. ROSNER: May the record reflect that I join in Mr. LaRossa's offer in evidence.

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MR. PELUSO: Likewise for Mr. DeFranco, Judge.

THE COURT: All right. Now it is a quarter past twelve. What do you think we ought to do here? Shall we recess now for an hour for lunch or do you want to go right ahead?

Give that to the clerk and we will put it in with the Court's exhibits.

Were you rising to the question of the next procedure?

MR. LAVIN: No, I just wanted -- that is the original tape. The Government was going to request that it be impounded.

THE COURT: All right. We are on something else at the moment.

What were you going to say, Mr. LaRossa?

MR. LaROSSA: I would like very much to have at least a half hour of testimony this morning, if we could. I have had witnesses here for two days.

THE COURT: All right.

MR. LaROSSA: They will be very short.

THE COURT: Perfectly all right. We can go right ahead.

Does anybody want a recess for five minutes?

MR. LaROSSA: Recess would be fine.

THE COURT: All right, recess for five minutes.

(Recess.)

(In open court; jury present.)

A L L E N A L B E R T S , called as a witness by the Defense, was duly sworn and testified as follows:

MR. LaROSSA: May I proceed?

THE COURT: Please go ahead.

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Alberts, by whom are you employed, sir?

A Well, I am self-employed and associated with Davis Henry at the Bryant Theater Ticket Service at 502 21st Street, Union City, New Jersey.

Q Have you been in the ticket agency business most of your adult life?

A Well, from the time I was 40-some-odd-years old. I am in the ticket business now since April of 1946.

Q Do you know Benjamin Mallah?

THE COURT: You were 40 years old in '46?

THE WITNESS: I beg your pardon, sir?

THE COURT: I say you were 40 years old in '46?

THE WITNESS: No, I'm sorry. Well, yes. No. Well, I was 37. No, 39.

THE COURT: All right. I heard you say that you

have been in the business since you were 40 years old.

THE WITNESS: Well, my adult life, I think, would start after 21, sir.

THE COURT: All right.

Q Mr. Alberts, do you know Benjamin Mallah?

A Yes.

Q Would you point to him if you can see him in the courtroom?

A Sitting right there with the glasses and moustache.

MR. LaROSSA: May the record reflect the identification, please.

THE COURT: Yes.

Q How long do you know Mr. Mallah?

A Since 1947.

Q How do you know him, Mr. Alberts?

A Well, I was in the ticket business and I was more or less a compulsive gambler, and I bet on almost everything, and I bet quite a -- with quite a few bookmakers, as we term them, and in '47 I met Benny and I was impressed by him as being a real nice fellow and very considerate and I started to give him some of my business. As I said, I bet more than one bookmaker. And I kept on betting him continuously throughout the years.

Q Referring you to 1971, did you bet Mr. Mallah

in that year?

A Yes, sir.

Q Where would you see Mr. Mallah when you wanted to place a bet?

A There were quite a few places. At that time, 1971, I was at that time established in Union City. We were at 31st Street at that time. We since have moved to 502 21st Street. And he would call me or I would call him and leave word that I am going to be in the city at a specified time around, within a half-hour period, and I would say, leave word at the Stage, the delicatessen or the Dempsey's, which at that time was -- now it is Dempsey's -- but I originally knew Benny when the other restaurant was there. It is now called Dempsey's. And I would leave word with one of the boys there to tell Benny the book that I'm going to be in New York about 4:30, 5:00, 5:30, I want to see him. When I said I want to see him, it was for the purpose of making a wager with him.

Q Would you meet Mr. Mallah at the Stage Delicatessen?

A I would meet him at the Stage. I would meet him -- they tell me that he was in the barber shop or that he was in -- if I missed him -- the first spot that I would go to, I stop off, would be Dempsey's. He was very -- well, he was more often he was at the Stage than at Dempsey's, but I'd

make that stop first in the event that he was there so that I wouldn't have to go up to the Stage Delicatessen.

Q Do you know where the Stage Delicatessen is?

A Surely.

Q Where?

A It's on Seventh Avenue between 54th -- 53rd and 54th.

Q Did you ever see Mr. Mallah take bets from anyone else at the Stage Delicatessen?

A Yes, I did. I saw -- there would be two or three tables and fellows would be sitting down there having a sandwich, and I assume that they were his guests, and then I'd see them walk over to Benny, and he'd write something down. I knew that it was a bet, because I knew the people who were sitting around the table. I have been on Broadway for close to 50 years.

MR. LAVIN: Objection. I ask that be stricken.

MR. LaROSSA: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Alberts --

A Yes, sir.

Q How often did you go down to the barber shop?

A I couldn't say exactly how many times.

Q Do you know a Mr. Herbert Sperling?

A No, sir.

Q Did you know a Mr. Louis Mileto?

A No, sir.

Q Did you know a Mr. Vincent Pacelli?

A No, sir.

Q Did you know a Mr. Barney Barrett?

A I knew a Barney. I knew him casually from around -- from around Broadway.

Q Ever place any bets with Mr. Barrett?

A Beg your pardon?

Q Ever place any bets with Mr. Barrett?

A I didn't quite hear that, sir.

Q Did you ever place any bets with Mr. Barrett?

A No, sir.

Q Did you ever see Mr. -- let me show you a picture. I show you Government Exhibit 61-A,B, and C. Let me show you 61-A first. Can you identify anybody in those pictures?

A I can't. There's no frontal views.

Q What about this person here?

A No, I don't know him.

Q What about this person here?

A That looks from the back like Benny.

Q What about this person here?

A Don't know him.

Q Did you ever see Mr. Mallah talking to this person here, the person that is facing him, on Government Exhibit 61-C?

A No, sir, I never did.

Q You never did?

A No, sir.

Q You don't know that person's name?

A I don't know who he is.

Q Did Mr. Mallah ever tell you that he was in any other kind of business?

A No, sir.

Q Did he ever tell you he was in the narcotics business?

A No, sir.

Q Do you think he would tell you if he was in the narcotics business?

MR. LaROSSA: Objection.

MR. MITCHELL: Objection.

THE COURT: Sustained.

Q How often when you were down at the barber shop did you stay there, how long a period of time?

A Oh, just to make a bet. Just to make a wager,

then leave.

Q You don't know what Mr. Mallah was doing when he wasn't taking bets from you, do you?

MR. LaROSSA: Objection.

THE COURT: Do you know?

Q Do you know?

THE COURT: Do you know what he was doing when he wasn't taking bets from you?

A No. As far as I knew, he was only a --

THE COURT: No. Wait a minute. Just answer the question.

Q Do you know?

A No.

MR. LAVIN: I have no further questions.

THE COURT: Any further examination?

MR. MITCHELL: Your Honor, I have one further question. You mentioned a Barney.

Will you stand up?

(Mr. Barrett stands.)

MR. MITCHELL: Is this the Barney you are referring to, Mr. Alberts?

THE WITNESS: Yes, I have seen him around and knew him casually for quite a number of years, in the area.

MR. MITCHELL: In the area?

THE WITNESS: That's right, sir.

MR. LaROSSA: I have no further questions.

THE COURT: Anybody else?

Thank you. You may step down.

(Witness excused.)

ROCKY GRAZIANO, called as a witness for the Defense, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Graziano, what is your occupation, sir?

A I am an entertainer.

Q Were you formerly employed in any other capacity?

A I was a professional fighter.

Q Were you the middleweight champion of the world?

A Yes, sir.

Q Have you lived in New York all of your life, sir?

A Most of my life.

Q Do you know Benjamin Mallah?

A Yes.

Q Do you see him in the courtroom?

A He is over there. I know him from the Stage Delicatessen.

MR. LaROSSA: May the record reflect that he identified Mr. Mallah?

THE COURT: Yes, sir.

Q How long do you know Mr. Mallah, Mr. Graziano?

A About 16, 17 years.

Q Talking about the years 1971 and 1972, did you know him in those years?

A Yes, I know him from the Stage Delicatessen.

Q Did you see him at the Stage Delicatessen often?

A I saw him in fact last week.

Q Was the Stage Delicatessen in 1971 and 1972 a place where various notables would come?

A Well, sports guys, guys in the entertainment field, you know, all kinds of guys, all kinds of people.

Q Did you ever have any business with Mr. Mallah in 1971 or 1972?

A Well, I could say we made a couple of bets with him, me, this Benny, and a couple of other guys. A couple of -- he was a bookmaker.

Q Did you know Jackie Leonard?

A Very well. We used -- in fact, we used to bet him, kid around. I am a small bettor, anyway. I'm not a big bettor.

Q Is Jack E. Leonard an entertainer?

A Yes, Jackie Leonard, yes.

Q Were you ever present with Mr. Leonard when he made

a bet with Mr. Mallah?

MR. LAVIN: Objection.

THE COURT: Sustained.

A Yes.

THE COURT: Strike out the answer.

Q Was Mr. Mallah at the Stage almost every time you were there, sir?

A Well, whenever I was there, most of the times he was there. I know him a long time from the Stage. That's all I know him from.

Q Did he seem to be well-known at the Stage?

A Yes, he was.

MR. LaROSSA: I have no further questions.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Graziano, have you ever been down to Ballantine's Barber Shop a block or so down from the Stage Delicatessen?

A Ballantine? No. I go into the barber shop next door to the Stage. The Stage Barber Shop.

Q Do you know the -- or been in the Gold Rail Lounge, the bar next to the barber shop, Ballantine's Barber Shop?

A Not really, no.

Q Do you know an individual named Mr. Herbert Sperling?

A No, sir.

Q Do you know an individual named Louis Mileto?

A No, sir.

Q Barney Barrett?

A No, sir.

Q Joseph Conforti?

A No, sir. The names aren't familiar.

Q Let me show you Government Exhibit 61-D. Can you identify any of the people in that picture?

A That looks like Sonny.

Q Sonny?

A Yes.

Q Sonny Gold?

A Yes, sir. Him I know for a long time. I know his son long.

Q Do you know this individual here with the S on his sleeve?

A No, sir.

Q Mr. Sperling, Herbert Sperling; do you know him?

A No.

Q Did you ever see him?

A No, sir.

Q Did you ever see him with Mr. Mallah?

A No, sir.

Q Here is a full-face of Mr. Sperling in 61-H. Did

you ever see him around?

A No, I don't know him. This is the barber guy.

Q Did Mr. Mallah ever tell you he was in the narcotics business?

MR. LaROSSA: Objection.

THE COURT: Overruled.

MR. LAVIN: Withdrawn.

I withdraw my withdrawal.

Q Did Mr. Mallah ever tell you he was in the narcotics business?

MR. LaROSSA: Objection.

A No, sir.

Q Aside from the times that Mr. Mallah placed bets with you, how often was that?

A Well, every once in a while. I mean, I knew that he booked in the place, like in the barber -- I mean in the restaurant, the delicatessen.

Q Did you know what he did when he wasn't taking bets from you?

A No, sir.

MR. LAVIN: I have no further questions. Thank you.

THE COURT: You can step down.

THE WITNESS: Thank you.

(Witness excused.)

M I C H A E L S A L A M O N E , called as a witness for the Defense, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Salamone, are you employed?

A Yes, sir.

Q What do you do, sir?

A I drive a taxicab.

Q Have you done that for most of your life?

A Since 1961 when I got hurt in construction. I was in construction all my life. I got hurt in Kips Bay Housing and I couldn't work no more on account of the back, and I got my license for hack driver.

Q Do you know Benjamin Mallah?

A Benjamin Mallah? Yes.

Q Can you point him out to us, please?

A (Indicating.)

MR. LaROSSA: May the record reflect the identification of Mr. Mallah.

Q How long do you know Mr. Mallah?

A About 20 years.

Q Where do you know him from?

A Seventh Avenue; Stage Delicatessen, the barber shop.

Q Did you see him at the Stage often?

A Yes.

Q Did you ever do any business with Mr. Mallah?

A Yes.

Q What?

A Give him horse bets.

Q Did you do that in 1971 and 1972?

A I did that in 1971 and 1972 and before that. But this year, about a year I don't bet wih him, though. I been going to the OTB now for the last eleven months.

Q Do you know Herbert Sperling?

A No.

Q Let me show you what is marked 61-D in evidence. There is a man here with an S on him. Do you recognize that man?

A I don't know him.

Q Do you know any of the men in this picture?

A No.

Q How often did you see Mr. Mallah at the Stage Delicatessen?

A Excuse me, sir?

Q How often would you see Mr. Mallah at the Stage Delicatessen in 1971 and 1972?

A Every time I'd pass there, even with the cab, I'd make my bet, and I'd go away. If he wasn't there he'd be in

barber shop.

Q What barber shop was that?

A Next to -- next to the Stage Delicatessen. There was another barber down further, too. There's two barbers. If I don't catch him in one barber, I catch him in the other barber or out in the street on the corner.

Q Were you present with other people when they placed bets with Mr. Mallah?

A There was other people there, you know what I mean, giving him bets, too.

MR. LAVIN: Objection.

MR. LaROSSA: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. LAVIN:

Q You don't know Mr. Sperling?

A No.

Q I show you a picture. Do you recognize that individual there in that picture?

A No.

MR. LaROSSA: May we know the exhibit number, Mr. Lavin?

MR. LAVIN: 61-H in evidence.

A I don't know him.

Q Here's a side picture, 61-H.

A No, sir.

Q Did you ever place a $50,000 bet with Mr. Mallah?

A $5, $10. What 50, are you out of your mind? I only drive a cab.

Q Did Mr. Mallah ever tell you what he was doing when he wasn't placing bets with you?

MR. LaROSSA: Objection.

A I know Mr. Mallah is a bookmaker and he is a gambler, too.

Q Do you know, aside from the time that he took bets from you, what he was doing, to your own personal knowledge?

A No, no, what he was doing, no.

MR. LAVIN: I have no further questions.

A I know he was bookmaking. That's all I know him.

MR. LaROSSA: Thank you.

THE WITNESS: That's all?

THE COURT: Step down.

(Witness excused.)

M A N N Y R O S E N , called as a witness by the Defense, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Rosen, by whom are you employed, sir?

A Stage Delicatessen.

Q What do you do at the Stage Delicatessen?

A I work as a counterman.

Q How long have you been with the Stage Delicatessen?

A About 28 years.

Q Did there come a time when you met Benjamin Mallah?

A About 25 years ago.

Q Will you look in the courtroom and see if you can see him, please?

A Yes, there he is (indicating). With the moustache and the glasses. Slightly bald.

MR. LaROSSA: May the record reflect the identification of Mr. Mallah, please?

THE COURT: Yes.

Q Did Mr. Mallah come into the Stage Delicatessen often during the years 1971 and 1972?

A Almost every day except there was a couple of days that he didn't show up. I thought he was in Florida or California or someplace.

Q Do you know what he would do at the Stage Delicatessen?

A He was a bookmakers.

MR. LAVIN: Objection.

THE COURT: All right, we will take it. It just takes a lot of time otherwise.

Q Did you ever place any bets with him yourself?

A Sure.

Q Did you ever take bets from anyone else to give to him?

A Yes. Quite a few.

Q Did you ever see him sitting at the tables with racing forms open in the Stage?

A No, at that time when Max was alive, we didn't -- he didn't allow the racing forms on the table, but now with the OTB, it could happen.

Q Mr. Rosen, I show you what has been marked 61-D in evidence, and I ask you to look at the man with the S on it. This man right here. Can you see that clearly?

A Yes.

Q Do you recognize that man?

A He comes -- he used to come in the Stage once in awhile to eat. That's the only thing I know about him.

Q Do you know his name?

A I think they called him Herbie. That's all I know.

Q Do you know any of the people in this picture?

A The fellow in the middle is a barber. He comes in the store quite often, every day almost.

Q I am referring to 61-H so the record may know it.

A This looks like this other fellow here.

Q Herbie?

A Yes. That looks like him.

Q Do you know anyone by the name of Conforti, Joseph Conforti?

A No, sir.

Q Barry Lipsky?

A No.

Q Or Mrs. Conforti?

A No.

Q Did you ever see Mr. Mallah and this man you call Herbie together?

A Never.

MR. LaROSSA: I have no further questions.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Rosen --

A Yes, sir.

Q Have you ever been down to 5 Spring Street?

A No.

Q Have you ever been inside the Gold Rail Lounge up the street?

A No.

Q Have you ever been inside Ballantine's Barber Shop?

A No.

Q Do you know a Louis Mileto?

A No.

Q Do you know what Mr. Mallah was doing when he wasn't in the Stage taking -- taking a bet from you?

A What he was doing after that?

Q When he wasn't there, do you know what he was doing?

A No, I assume he's a bookmaker.

Q Do you know to your own knowledge?

A To my own? Nothing, except bookmaking.

Q Do you know to your own knowledge? When he wasn't in the Stage placing a bet with you, do you know what he was doing?

A How could I know what he was doing if I wasn't with him?

THE COURT: He is asking you. The answer is what, yes or no? Do you know what he did when you weren't around there?

THE WITNESS: Yes, he was bookmaking.

THE COURT: You know that he was, then, there?

THE WITNESS: Maybe he was out making calls with collecting bets and other places.

THE COURT: We are not interested in "maybe," Mr. Rosen. We want to know, do you know?

THE WITNESS: Yes, I know.

THE COURT: Do you know?

THE WITNESS: Yes.

THE COURT: All right.

MR. LAVIN: I have no further questions.

BY MR. MITCHELL:

Q Mr. Rosen, I just have one question.

MR. MITCHELL: Will you stand up?

(Mr. Barrett stands.)

Q Did you ever see this gentleman in the Stage Door?

A The Stage Door? No, the name is the Stage.

Q I mean the Stage Delicatessen.

A Once in awhile he used to come and eat.

MR. MITCHELL: I have no further questions.

MR. LaROSSA: I have nothing further.

THE COURT: Step down.

(Witness excused.)

C E L I A B E Z D Z I E C K I , called as a witness by the Defense, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Would you please pronounce your last name for me?

A (Pronouncing "Bez-yet-skee.")

Q Miss Bezdziecki, by whom are you employed?

A The Stage Delicatessen.

Q In what capacity?

A Waitress.

Q How long have you been there?

A A little over 19 years.

Q Do you know Benjamin Mallah?

A About that length of time.

Q Do you see him here in court?

A Yes, I do. The gentleman with the glasses and the moustache.

MR. LaROSSA: May the record reflect the identification, please.

THE COURT: Yes.

Q Did you see Mr. Mallah during the years 1971 and 1972?

A Very often.

Q Where?

A At the Stage Delicatessen.

Q Was he there almost on a daily basis?

A Pretty much so. Pretty much so.

Q What was he doing there?

A Well, as I would say, I gamble myself. I would say that he's a bookie.

MR. LAVIN: Objection.

A Continue? I used to supply him myself with horse

papers, and I saw customers with my own eyes go up, hand him slips, there was an exchange of money. I myself have bet with Benny.

Q Do you know whether he is in any other kind of business besides being a bookmaker?

A This is to my knowledge the only thing I ever saw.

Q Let me show you what has been marked 61-D in evidence, please. I ask you if you know the man with the S?

A Yes, I do.

Q Do you know his name?

A I know him as Herbie. He is a customer. I used to serve him in the Stage occasionally.

Q Do you know any of the people in this picture?

A Ralph, the owner of the barber shop, and Herbie.

Q How often would Herbie be in the Stage?

A I didn't serve him all the time, and I didn't see him just until recently in the Stage. I don't know him really. Benny I know for years.

Q Do you know anyone by the name of Lipsky?

A No, sir.

Q Do you know anyone by the name of Conforti?

A No, sir.

Q Do you know anyone by the name of Mileto?

A No, sir.

Q Did you ever see Mr. Mallah and this man Herbie sitting together and talking?

A I have never seen Herbie and Benny together; never.

MR. LaROSSA: No further questions.

CROSS-EXAMINATION

BY MR. LAVIN:

Q I show you Government Exhibit 61-C. Can you identify the two people standing next to the car?

A I would say that looks like Benny and Herbie.

Q Are they together there in that picture?

MR. LaROSSA: Objection.

A It's hard to say, sir.

MR. LaROSSA: Objection.

A I really can't specify.

THE COURT: The objection is sustained. The picture will speak for itself.

What did you point out as who? Which one did you point to? Who did you identify?

THE WITNESS: This one,I think that's Herbie.

THE COURT: You think?

THE WITNESS: I can't see a full face, sir.

THE COURT: Yes?

THE WITNESS: And this is a back picture.

THE COURT: Yes?

THE WITNESS: I can't see the face front. I can't see face front here, sir.

THE COURT: Who do you think it is?

THE WITNESS: Could be anybody.

THE COURT: Don't you know? Could be anybody. All right.

Q Have you ever been in the Gold Rail Lounge?

A (Shaking head, no.)

Q In the barber shop?

A Excuse me, sir?

Q In the barber shop?

A I didn't hear the question.

Q Ballantine's Barber Shop, have you ever been in there?

A I pass by it, sir. I have no occasion for a barber shop.

Q Did you ever see Mr. Mallah and Mr. Sperling talking in front of that barber shop?

A Never, sir.

Q Did you ever see Mr. Mallah talking to anybody else in front of that barber shop?

A I only know Mr. Mallah from the Stage, sir.

Q . Do you know what he does when he is not in the Stage?

MR. LaROSSA: Objection.

THE COURT: Have you any knowledge, any personal knowledge, of what he does outside of your view in the Stage?

THE WITNESS: All I know is what I see in the Stage, that he's a bookie.

Q How much money did you bet with Mr. Mallah at any one time? What was the size of your bet?

A Being a working girl, I mean, if I bet $20, if I bet $30, that's a big bet for me.

Q How often would that be?

A It depends. Maybe two, three times a week, maybe I don't bet for a week or two; it varies.

Q Did you ever bet $8,000 with Mr. Mallah?

A $8,000?

MR. LaROSSA: Objection.

THE COURT: Objection is overruled.

Did you ever bet $8,000?

THE WITNESS: Sir, $8,000?

THE COURT: What, are you asking me?

THE WITNESS: No, you asked me. You shocked me, that's why I -- you know, you took my breath away for a minute. $8,000.

THE COURT: What is your answer?

THE WITNESS: No, sir, no.

THE COURT: Thank you, you are excused.

MR. MITCHELL: Your Honor, I just want to ask her one question.

THE WITNESS: Yes, sir.

BY MR. MITCHELL:

MR. MITCHELL: Will you stand up?

(Mr. Barrett stands.)

Q Did you ever see Mr. Barrett in the Stage Delicatessen?

A I may have seen him, sir. He may have come in to eat there. That's possible. I wait on an awful lot of people, sir. You can't pinpoint, you know.

MR. MITCHELL: I have no further questions.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

G E R A L D A N T H O N Y R I S P U L O , called as a witness by the Defense, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Rispulo, what is your occupation, sir?

A Well, right now I am unemployed. I am going to school.

Q What school is that, sir?

A Programming systems, computer programming.

Q Did you ever work for Goldsmith's?

A Yes, sir.

Q Is that a stationery supply house?

A Yes, sir.

Q Where is that, where is Goldsmith's located?

A The main store is on 77 Nassau Street in New York.

Q Do you know Benjamin Mallah?

A I know Benny.

Q Can you point him out for us, please?

A Yes (indicating), the fellow in the glasses and the moustache.

MR. LaROSSA: May the record show an identification of Mr. Mallah, please.

Q When was the first time you met Mr. Mallah?

A Well, I met Benny about 1967 when I worked for Goldsmith Bros., along about May he came up to buy some pads and pencils, and I looked, the particular pads and pencils he wanted I was very familiar with because when I used to work, I used to work for a bookmaker and we called them bookmaker pads because of the size and the length of the size of the pads which was strictly used for bookmaking purposes.

So he asked for six dozen, and I looked, and I -- but I didn't say nothing at that time. Then he came back about a month later and asked for six dozen more, and that's

when I got to talking to him, you know, made conversation. I told him,I said, "How's business?" And he looked at me. I said, "I'm familiar with the pads myself," you know, and I says, kidding around, I says, "Do you have a good office for me to call?" Because, you know, I like to do my gambling.

Q Did you call him,Mr. Rispulo?

A Excuse me?

Q Did you place bets with him?

A Oh, yes.

Q Did you place bets with him in 1971 and '72?

A Up until May of '72, because I called in May of '72 for -- because it was a MemorialDay and it was a lot of double-headers, and I called the telephone operator, you know, this number is disconnected. So that was the end of my bets with Benny.

Q How many times did you supply him with these pads that you are talking about?

A Well, since 1967, to '72, I'd say about at least -- because we never always -- they never stocked them all the time, you know, so I'd say about eight times a year.

Q Did you ever deliver these pads to Mr. Mallah?

A Yes, sir.

Q Did you ever deliver them to him at the Stage Delicatessen?

A Stage Delicatessen most of the time, and then there was two addresses uptown that I delivered them to.

Q When you placed bets with Mr. Mallah did you do so at the Stage?

A Well, not necessarily, because I didn't want to -- I don't know the line at the time, so I -- when I'd finish delivering the pads, I'd call up the office and get, you know, the latest line on the games, and that's when -- but I did talk to him. Well, I made the payment, when I had to pay him when my bets would go down, I would have to go up there and pay him or else vice versa when I had money coming.

Q Go up where?

A He would pay me.

Q Go up where, to the Stage?

A Stage.

Q Let me show you what's been marked Exhibit 61-D in evidence. Do you see a man with an S on his sleeve?

A Yes, sir.

Q Do you know that man?

A No.

Q Do you know the name Herbert Sperling?

A No.

Q Do you know any of the people in this picture?

A No. Well, maybe -- I believe if it's -- I met him

in the witness room, if this is the middle guy.

Q Before today did you know any of the people?

A No, I never knew them before.

Q Do you know the name Joseph Conforti, Mr. Rispulo?

A No, sir.

Q Do you know the name Barry Lipsky?

A Who?

A Barry Lipsky.

A No.

MR. LaROSSA: I have no further questions.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Rispulo, you are talking about pads. What are they, just lined pads with columns for totaling up figures? Is that what you mean, accounting pads?

A Well, yes; well, they would be used, I guess --

Q What are they made for, Mr. Rispulo?

A Excuse me?

Q Are they made for adding up figures?

A Yes, adding up figures.

Q Do you know what Mr. Mallah did with those pads after he got them?

A Do I know?

Q Do you know if he added up money from heroin

purchases and sales?

A No.

Q You don't know, do you?

A No, I don't.

MR. LAVIN: I have no further questions.

THE COURT: What did you say your job was with Goldsmith's?

THE WITNESS: I was working in the stationery department?

THE COURT: Salesman in the stationery?

THE WITNESS: Salesman.

THE COURT: Were you also a deliveryman?

THE WITNESS: Delivery?

THE COURT: Yes.

THE WITNESS: Well, I sometimes, when Benny would call up and ask for the pads, I would deliver them, pay for them out of my own pocket, and deliver them because he said he couldn't make it down, could I do him the favor of delivering the pads up. Andhe would take care of, you know, through me, a couple of dollars. Take care of my cab fares and I would deliver the pads to the Stage.

THE COURT: During the day?

THE WITNESS: No, after work, after work. I couldn't do it during the day.

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THE COURT: All right. Step down.

(Witness excused.)

THE COURT: Anything else, Mr. LaRossa?

MR. LaROSSA: No, sir.

THE COURT: Ladies and gentlemen, we will take a recess for lunch until five minutes past two. You may go out.

(The jury left the courtroom.)

(Luncheon recess.)

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AFTERNOON SESSION 2:05 p.m.

(In the robing room; all counsel present.)

MR. LaROSSA: Sir, I want to make a motion under United States against Palumbo to exclude convictions of Mr. Mallah that are as old as 1952.

THE COURT: Did you talk to Mr. Lavin about it?

MR. LaROSSA: Frankly, I did not.

THE COURT: Ask him whether he agrees with you and that will settle the whole thing. In the meantime, I think Mr. Duke wanted to say something.

MR. DUKE: Yes, your Honor. I raised this point earlier. I want to call as a witness Louis D'Ambrosio, who testified in the last trial. The Government gave us 3500's on him in this trial. He informed me yesterday morning when I questioned them that they did not intend to call him. I indicated that they told to your Honor that they told me they were not inclined to tell me his whereabouts.

Yesterday afternoon Mr. Lavin said they were attempting to locate him, and I indicated to Mr. Lavin that to tell him that I wanted him as a witness. This morning I get a note indicating his address, and I asked for his phone number. Mr. Lavin wouldn't give me his phone number. The first time I could reach a phone was at lunch. His phone number is unlisted. I am in a position now where the

Government, I think, is playing games with me, and they are trying to deny me a witness. And I would request the Court's assistance in getting this witness in here this afternoon.

THE COURT: What efforts did you make to subpoena this witness in advance of the trial?

MR. DUKE: None.

THE COURT: All right.

MR. LAVIN: May I respond to that, your Honor? Mr. Duke asked me the other day about it. I said I didn't know his address, I'd try to get it. I called Mr. D'Ambrosio last night, as I told Mr. Duke. I said, "They want to call you as a witness." He says, "They are going to have to subpoena me." He is not under our control. He is not a police officer any more. He gave me his address. I gave it to Mr. Duke this morning.

THE COURT: In any event he was a city policeman, wasn't he?

MR. LAVIN: He was a city policeman.

THE COURT: Not part of the federal system?

MR. LAVIN: No, he wasn't.

MRS. ROSNER: He was on the Joint Task Force.

MR. DUKE: During the relevant time, your Honor, he was on the Joint Task Force.

THE COURT: What has that got to do with it?

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That is an irrelevant comment. It seems to me that the problem here is you didn't make arrangements to have him at the trial, and now you are laying it onto the Government.

MR. DUKE: Your Honor, the Government gave me 3500's on him.

THE COURT: I can't be -- regardless of your insufficiences in this area, if you tell me how I can help you, I will. But I don't propose now to accept these constant beefs, the Government did this, the Government did that. If they did, I will hold them to it. But if they didn't, and it is your insufficiency, don't lay it on somebody else.

MR. DUKE: Your Honor, they gave me 3500's on this witness.

THE COURT: What difference does that make? You got a whole lot of material out of order. You are not entitled to any 3500 material until after the witness' direct testimony, and I arranged for all lawyers to get accommodation on that subject in advance of anything. Now, just because they gave you the 3500 material, and because you have the testimony of the last trial, doesn't excuse you preparing your own case.

MR. DUKE: But, your Honor, they --

THE COURT: What can we do about getting him here? Do you know?

MR. LAVIN: I can have the agents try to reach him a

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home again.

MR. LaROSSA: You can orally subpoena him. The Court can orally subpoena him.

THE COURT: Orally subpoena him? I suppose that that will raise problems. I don't want to start delaying this trial while the fellow goes and gets himself a lawyer who will tell him what the judge says is his business.

MR. LAVIN: Why can't someone go out to his house and give him a subpoena?

MR. DUKE: Because I was presented with this information this morning. I don't have anybody standing at my side to run out there with a subpoena. I don't have a phone number for this man yet.

MR. LAVIN: I just told you he is not going to come in on a phone call. I asked him to come in. He wouldn't come in for me. He wants a subpoena.

MR. DUKE: You asked him to come in and he refused to come.

MR. LAVIN: You wanted to call him as a witness. He said, "They are going to have to subpoena me."

THE COURT: I make it a practice, Mr. Duke, to try and accommodate everybody. If you can think of a way in which I can accommodate you that makes sense, I will help you.

MR. DUKE: Your Honor, I am confident that the man

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would honor a request from you that he appear.

THE COURT: I don't intend to call people on the telephone to make requests of them to come in.

MR. DUKE: He would honor a request --

THE COURT: You may send somebody out there. You have enough people hanging around the courtroom there to send somebody there.

MR. DUKE: Your Honor, I don't have any people hanging around the courtroom.

THE COURT: There are enough people out there who seem to be interested that could make the trip. You have his address and I suggest you send somebody out there posthaste in a taxicab, leave the word, and you may underscore it by saying that the defense would like to subpoena you and the judge would like to have you come in. I am not ordering him, but I say I would like to have him come in because I don't think I have the power to go ordering people orally to do this, that or the other thing. But if it will give any sanction to it, you can put it that way.

Now, did you agree with Mr. LaRossa?

MR. DUKE: May I be excused, your Honor?

THE COURT: Sure.

(Mr. Duke left the courtroom.)

(Discussion off the record.)

MR. DUKE: Your Honor, I have canvassed the courtroom to see if somebody will serve a subpoena for me, including somebody from the marshal's office. The people tell me there is nobody from the marshal's office that will do it this afternoon. I can't find anybody else that will do it, and I am left in a position of having to call the man, and I don't have his phone number and it is unlisted.

I would like to have his phone number so I can be given an opportunity to call him and ask him to come in.

THE COURT: I am not authorized to compel anybody who has instructed the telephone company not to give out a phone number. I will parenthetically tell you this, that the night before last I had the following experience.

The New York Telephone Company itself telephoned to me on an unlisted telephone number and said that there was a grave message and I should please call a certain number which they gave me.

I telephoned that number and discovered that some person had passed away.

So the fact that there is an unlisted telephone number, with a certain amount of resourcefulness, doesn't stop communication.

Furthermore, the fact clearly appears that you made no preparation for this man to appear here as a witness other

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than to lay it on somebody else.

Let me ask you this further question: What do you intend to prove by this man?

MR. DUKE: I intend to prove by this man that he and other officers conducted a surveillance of one Louis Valentine on or about September 28, 1971. They followed him to the Yellowfingers Restaurant at 60th and Third Avenue, that they observed him entering Yellowfingers and meeting with one Barry Lipsky and handing something to Barry Lipsky, Lipsky leaving, getting into Valentine's car, going to 1420 Third Avenue, staying in the apartment about 20 minutes, coming back with what appeared to be some kind of a package, returning to the Yellowfingers, entering the Yellowfingers, and thereafter Mr. Valentine leaving and getting back into the car that Lipsky was driving.

MR. LAVIN: Is that all?

THE COURT: Is the Government willing to stipulate?

MR. LAVIN: I will stipulate to that. I would have to check the record, but --

MR. DUKE: Your Honor, maybe -- I have the 3500 from Mr. D'Ambrosio --

THE COURT: Don't try and expand it. You put your best foot forward in an area where you are at fault.

MR.DUKE: Obviously I want a live witness, but if

I can't have a live witness,if the Government will stipulate to substantial portions of the 3500 material from D'Ambrosio, that would mitigate considerably.

THE COURT: In addition to what you have already recited, what do you want? Get the material here and let's have it in exact fashion.

MR. DUKE: The addition, your Honor, is --

THE COURT: No, no. I want it exactly from there so that there are no words that have trucks to be driven through. I have been on appeal so often with these offers of proof I want to make sure we get it right.

(Discussion off the record.)

MR. LAVIN: I would hesitate to stipulate that if called, Detective D'Ambrosio would testify that he did all this. But about Nunziata and Ruggiero seeing this and doing that --

THE COURT: Let me see what you are talking about, and see whether I can't compromise this thing.

Where are the brackets?

MR. LAVIN: Mr. Duke has them.

MR. DUKE: I want the first part of that sentence and then six and seven in that, and that much of eight.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Gentlemen, you have both been examining a Jenks Act material, No. 3501 from the Sperling trial, and the Government has indicated that it is willing to stipulate to the matters bracketed in green on page 2 of that report of investigation, and on that basis, Mr. Duke withdraws any request on behalf of his client in respect of the appearance or non-appearance of Mr. D'Ambrosio. Is that correct?

MR. DUKE: Your Honor, it is correct if I am not precluded from offering his testimony.

THE COURT: All right, gentlemen, go back. Since there is no stipulation, go back to the beginning part of it, and I think we have spent nearly an hour on this, and it looks like the Court is being put upon.

Counsel has failed to subpoena a witness whom he wanted to call on this trial, he has no legal excuse for having failed to do so. He has, as an accommodation, been offered an opportunity to read into the record what he says was the 3500 material of the witness. He now seeks to expand on that and that cannot -- we are not going to let this thing grow like Topsy.

I see no occasion whatever to postpone this trial for any purpose in connection with Mr. D'Ambrosio, and particularly in connection with this fractional portion of the information.

This has to do with a surveillance of Mr. D'Ambrosio, Mr. Valentine, and Mr. Lipsky, and there is no word or mention in the report of investigation whatsoever of Mr. Pacelli, either his presence or his absence.

Under the circumstances, there can't be any conceivable prejudice.

Let's proceed.

MR. DUKE: May I take exception to your Honor's findings of fact?

THE COURT: Yes, you can, but don't hold me up hereafter and ask me to give you stipulations when you start expanding them as soon as you get a finger. We have spent about an hour in attempting to achieve an accommodation and have failed.

(In open court; jury present.)

THE COURT: All right, Mr. LaRossa, can you go ahead now?

MR. LaROSSA: Defendant calls Benjamin Mallah.

B E N J A M I N M A L L A H , a Defendant herein, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LaROSSA:

Q How old are you, Mr. Mallah?

A Forty-eight.

Q In 1971 and 1972, what were you doing?

A My occupation?

Q Yes.

A I was a bookmaker.

Q Try and talk up a little louder.

A I was a bookmaker.

Q Where were you taking book?

A Well, the vicinity of the Stage, Seventh Avenue, the whole vicinity of Seventh Avenue between the Park Sheraton and the Stage.

Q How long were you active in the area of the Stage of Seventh Avenue in accepting bets?

A At least 25 years.

Q Are you familiar with a barber shop called Ballantine's?

A Yes.

Q Have you been in it many times?

A Many times.

Q Are you familiar with the Stage Delicatessen?

A Very familiar.

Q Have you been in it many times?

A Many times.

Q What do you mean by many?

A Well, I would say the first -- I would say the

first 20 years practically on a daily basis; and the last five years, very often, but unless I took trips somewhere.

Q Do you know Mr. Pacelli?

A No. I met him at the -- first time I saw Mr. Pacelli was at the pre-trial conference.

Q In this case?

A In this case.

Q Is that sometime this year?

A Yes, last -- two months ago.

Q Two months ago?

A Approximately two months ago.

Q Do you know Mr. Catino?

A Also I met him at the pre-trial conference.

Q Didyou know him before that?

A Never.

Q Did you know Mr. DeFranco?

A No. Also met him at the pre-trial conference.

Q Do you know Jack Spada?

A No.

Q Ever meet him?

A Never.

Q Do you know Mr. Conforti?

A Never met him until he -- never saw him until he sat on this witness stand.

Q Do you know Mrs.Mileto?

A Never saw her until she sat on this witness stand.

Q Mr. Mallah, have you ever possessed any kind of narcotic drug?

A Never.

Q Have you ever had it in your hands?

A Never touched it or saw it, looked at it.

Q Have you ever, sir, instructed anyone else to have a narcotic drug?

A Never.

Q Have you ever had a conversation with anybody about possessing or distributing any kind of a narcotic drug?

A Never in my life.

Q Do you know Herbert Sperling?

A Yes.

Q How long do you know Herbert Sperling?

A I'm not sure. I would say about three to four years. Maybe less. I am giving the maximum amount.

Q Tell me where you met him, if you recall.

A In the vicinity of Seventh Avenue that I described to you before.

Q Did you ever do any business with Mr. Sperling?

A In what context? Gambling?

Q Any context.

A Gambling.

Q Tell us what you mean by that.

A Well, we struck up an acquaintance, and naturally I guess I was pointed out to him as a bookmaker, and he started to give me some action.

Q Did you ever received $75,000 from Mr. Sperling?

A I never saw $75,000 in my life in its entirety.

Q Did you ever talk to Mr. Sperling about $75,000?

A Never.

Q Were you in his apartment on Spring Street at any time?

A Never.

Q Were you ever there when Mrs. Mileto was there and Mr. Sperling packed an attache case with $75,000 and gave it to you?

A I never entered an apartment in Spring Street.

Q Were you ever in the Stage Delicatessen with Mr. Conforti?

A Never. I never met Mr. Conforti until -- I never saw him until he sat on this witness stand.

Q Were you ever in any apartment anywhere with Mrs. Mileto?

A Never.

Q Did you ever have a conversation with Mr. Sperling

where you said to him, "Do you have enough money to cover this" in his apartment with Mrs. Mileto?

A Never.

Q Did you ever have a conversation with Mr. Sperling about $50,000?

A Never.

Q Did you have conversations with Mr. Sperling?

A Yes.

Q What were they about?

A Different transactions that took place between us as far as gambling.

Q Did Mr. Sperling bet you?

A He bet me and I also gave him some action.

Q What was the most that he ever bet with you?

A I would say the top bet that ever crossed our hands would be about $1500.

Q Mr. Mallah, who is David Barton?

A That is an assumed name that I used.

Q When did you use that name?

A Approximately two years ago.

Q Why did you use that name?

A I went to Florida, and in the Hallandale area, and I rented an apartment under David Barton for the purpose of establishing a phone that I could use in my business.

Q Why didn't you use the name Benjamin Mallah?

A Well, knowing the risks of the business I was in, it would -- you are always afraid of tapped telephones or -- because of the business I was in.

Q Did you believe you were known as a known gambler?

A Yes.

Q Have you used other names besides Barton in your lifetime?

A Many names.

Q Tell us what names you have used.

A Well, I have had apartments under Eller.

Q How do you spell that?

A E-l-l-e-r.

Scott. I have had -- I don't recall many of the names. I recall a couple of real estate people that I went to and applied. I went to Bing & Bing and got an apartment under an assumed name. I don't recall the name at the moment. It is either Stein or Rosen.

Q Before you would get these apartments under an assumed name, would you have to have identification?

A Yes.

Q Would most landlords request that?

A Yes. Bank account or checking account, or some kind of a bank reference.

Q I show you what has been marked as Exhibit 78 in evidence.

MR. LaROSSA: May I approach the witness?

Q They refer to David Barton, do they not?

A Yes.

Q Some of them are in 1972; is that right?

A Correct.

Q When did you begin using the name David Barton, do you recall?

A It would have been the spring -- it would have to be the spring of '72 -- or '71. Let me see. The spring of '71.

Q Did there come a time --

A No, I'm sorry, I'm trying to get my years straight.

Q Stop and think for a moment.

A It would have to be the spring of '72. I think I paid my first month's rent there.

Q Did there come a time when you went to Florida during 1972?

A Yes.

Q When was that?

A Early December.

Q Did you establish any kind of a residence in Florida at that time?

A I still had David Barton. I kept it from the spring of -- from the spring of '72 up until I would say March, February or March of '73.

Q What were you doing in Florida during that period of time?

A The same occupation I had in New York.

Q What's that?

A Bookmaking.

Q Did there come a time when you left Florida in 1973?

A Yes, I left sometime in the middle of April.

Q You heard a stipulation being entered into by Miss Nancy O'Malley?

A Yes.

Q Who is Miss Nancy O'Malley?

A She is a girl I have known for 17 years.

Q Did you leave Miss Nancy O'Malley's residence sometime in April?

A Yes, I did.

Q Did you do that because you knew about an indictment in this case?

A No, sir.

Q Why did you leave?

A Well, this was the second winter I was in Florida. The winter previously I had received word that there was a

subpoena for me, and exactly a year later, the same month, I received word that there was another subpoena out for me for a bookmaking activity that took place in Miami, in the Miami Beach area.

Q Is that what caused you to leave Miami?

A Yes.

Q Where did you come from Miami? Where did you go to?

A Well, when I left Miss O'Malley's residence I stayed in Miami. I checked into a Holiday Inn under David Barton.

Q For how long?

A For about a week, I would say. A week to ten days.

Q Then what?

A Well, I made a telephone call -- am I allowed to put -- or should I just tell you that?

Q Tell us what you did.

A Well, I called my sister up in Brooklyn, and she told me my mother was very ill, and I drove up to New York. It was about a three-day drive.

Q Did you visit your mother in the hospital?

A I called her every day on the road, and when I got to New York I visited her at the Trafalgar East Hospital.

Q What did you do when you reached New York, Mr. Mallah? Where did you take up residence?

A Well, I think the first day I stayed in various

hotels -- the first day I stayed in the Chateau in Jersey, which I didn't care for, and I went to the -- after I visited my mother, I went to the -- I think it was the No. 1 Fifth Avenue Hotel for a day or two, I'm not sure how many days.

Then I finally settled in the Alrae Hotel. This is all under David Barton. The Alrae on East 70th Street.

Q Did there come a time that you spent any time outside of New York City in 1973? After April?

THE COURT: How do you spell the Alrae?

THE WITNESS: A-l-r-a-e.

Q Outside New York City?

A After April? I made several trips to New York State, the mountains, the resort area.

Q Did you spend any time up there?

A Yes, I spent some time up there.

Q Where?

A Well, I -- my first trip was to Monticello, and subsequent to Monticello was Saugerties, New York.

Q What was your purpose in going up to the mountain area at that time?

A I thought I can engage in the same thing that I was doing.

Q What do you mean by the same thing?

A Bookmaking.

Q Did there come a time when you came into New York City and rented an apartment?

A Yes.

Q What name did you use?

A Morris Geller.

Q Where was that apartment?

A 420 East 66th Street.

Q Where did you live in 1972 when you were in New York City?

A I lived in -- at one -- I think it was -- well, I don't think -- I think the end of '72, 160 East 63rd Street.

Q Where was that in relation to this apartment on 66th --

A Just about three blocks away.

Q When did you move into that apartment at 420 East 66th Street?

A August 1st.

Q From August 1st until the day you were arrested, did you go into shops and stores in the area of 66th Street?

A No, I went into shops and stores where I previously lived. I went into the cigar store on the corner, on 63rd Street, 63rd and Third. I used to get my papers there, cigarettes.

Q Is this a store where you were known?

A Yes.

Q Any other places?

A Restaurants, the same restaurants, coffee shops, that I went to in that area.

Q This moustache that you have now, is that the first time in your life you have ever had a moustache?

A I have grown a moustache at least ten times in my life.

Q Exhibit 5 --

A Yes.

Q -- the toupee --

A Yes.

Q -- is it yours?

A Yes.

Q Is that the first time you have ever had a toupee?

A No. In fact, I have two of them at this time.

Q Have you ever had a hair transplant?

A Yes. Twice. I went for two treatments.

Q When did you get that toupee?

A After I stopped my treatments with the hair transplant.

Q When was that?

A About four years ago.

Q You have seen Exhibit 79, which is composed of money?

A Yes.

Q You have been told it is approximately $8500?

A I have been told that.

Q You heard that in court here, didn't you?

A Yes, I did.

Q Do you know where this money came from?

A It is my money.

Q Where was it?

A Pardon me?

Q Where was this money on the day you were arrested?

A Well, number one, I have to dispute the amount.

Q What do you mean by that?

A Well, I -- my -- I say it was $9700, because I had $5,000 in the dresser drawer, a reserve that I had, that was wrapped up, and I had -- I know I had $4700 in my pocket when I was arrested.

Q Where did that money come from?

A Well, I would say 60 percent of it was what I started -- 60 or 70 percent of it was what I started out from Florida with to New York, and I earned the rest in the New York area.

Q What do you mean, you earned the rest? How did you earn it?

A The same thing I always did.

Q What?

A Bookmaking.

Q Did you ever meet Barry Lipsky?

A Never in my life.

Q Did you ever see him before you saw him testify in this court?

A Never saw him until he took this witness stand.

Q Have you ever been to the Hippopotamus?

A Never in my life.

Q Have you ever been to the Directoire?

A Never.

Q Have you had an opportunity to read the indictment in this case, the indictment that charged you with this crime?

A Yes, I think I glanced over it in your office. I didn't read it thoroughly.

Q By the way, when you came back from Florida, did you ever return to the Stage from April until the day you were arrested?

A I would say twice, I returned there.

Q Did you go back to other restaurants and bars that you were known in?

A I went to Jack Dempsey's one afternoon. On the West Side not too much. I stayed off the West Side on my return. I was staying on the East Side.

Q What about Morris Geller? Who is Morris Geller?

A That is a name that I took when I rented the apartment on East 66th Street.

Q Why did you not use the name Barton?

A Well, number one, like I explained my problem in Florida with Barton. Number two, Barton was expiring. My license --

Q What do you mean?

A My license for David Barton had expired May 31.

Q Mr. Mallah, did you sit down and agree with any of the following people to possess or distribute any kind of narcotic drug: Mr. Pacelli? Did you ever sit down and talk to him?

A Never.

Q Or agree with him to possess or distribute any narcotic drug?

A Never, never.

Q Mr. Catino?

A Never.

Q Mr. DeFranco?

A Never.

Q How about Mr. Barrett? Do you know Mr. Barrett?

A I know Mr. Barrett 25 years.

Q Do you know him from Seventh Avenue as well?

A I know him from Seventh Avenue and all my life. The complete Broadway area.

Q Have you ever sat down and talked to Mr. Barrett about possessing or distributing any kind of a narcotic drug?

A Never.

Q Have you ever heard him discuss the possession or distribution of any narcotic drug with anyone?

A Never.

Q Do you know a Mr. Torres, Ismael Torres?

A I know a Mr. Torres, but not by Ismael.

Q Did you ever sit down and have an agreement with a Mr. Torres about possessing or distributing a narcotic drug?

A Never.

Q How about a Mr. Salanardi?

A Never, not --

Q Mr. Sample?

A Never.

Q Mr. Perez?

A No.

Q Mr. Bracer?

A No.

Q Mr. Ramirez?

A Not a human being.

Q Did you ever sit down and talk to anyone about

possessing or distributing any kind of a narcotic drug?

A Not a living human being.

Q Are you innocent of these charges?

A Yes.

MR. LaROSSA: I have no further questions.

I'm sorry, I have one more question, if I may.

Q Were you in New York on August 16, 1972?

A I don't recall the exact day, but I could have been.

Q I show you what has been marked 61-C in evidence, referring you to the M, that's you, isn't it?

A That's me.

Q And 61-B, where the name Mallah appears?

A That's me.

Q Is that Mr. Sperling next to you?

A Yes.

Q 61-D, is that you and Mr. Sperling standing together at the same time?

A Correct.

Q By the way, did you know a Mr. Goldstein?

A Yes.

Q How long do you know Mr. Goldstein?

A At least 25 years.

Q Did you ever talk to Mr. Goldstein about possessing or distributing any narcotic drugs?

A Never, and he never spoke to me about it.

Q Did you hear Mr. Lino testify in this courtroom? The patrolman who testified he was in the trunk of the car?

A I recall that testimony.

Q Did you have a conversation with Mr. Sperling on that day where you talked about "50 thou"?

A I never heard the expression "thou," "50" or "thou" I never heard outside of the movies. In the language we use I never heard the expression "thou."

Q Did you ever tell or were you ever told by Mr. Sperling, "We have to get that stuff"?

A Never. Never heard that expression.

MR. LaROSSA: I have no further questions.

THE COURT: Are there any other?

MR. MITCHELL: Yes, I would like to.

THE COURT: Go ahead.

MR. MITCHELL: May I stay here, your Honor?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. MITCHELL:

Q Mr. Mallah, you say you knew Mr. Barrett for approximately 25 years?

A Yes.

Q Were you aware of any problems that he had?

A Yes, I was aware. From time to time.

Q What were his problems?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q During that period of time, were you aware of the fact that he went to mental institutions?

MR. LAVIN: Objection.

THE COURT: Sustained.

MR. MITCHELL: I have no further questions.

THE COURT: Any other defendant wish to examine? No other defendant wishes to examine?

Government may cross-examine.

MR. LAVIN: May I have this marked as Government Exhibit 83, please, for identification.

(Government Exhibit 83 marked for identification.)

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Mallah, I believe you testified that you had approximately $9700 in your apartment?

A To the best of my recollection, yes.

Q I show you what has been marked Government Exhibit 83 for identification. Isn't that your signature on there?

A That is.

Q Isn't that a receipt for $8550?

A Yes.

Q Doesn't that say right above where you signed it that the money has been turned over to the IRS?

MR. LaROSSA: Objection.

THE COURT: Well, I put the question in another form. Looking at that, do you recall now what you wrote?

THE WITNESS: That I wrote? I just wrote my signature.

THE COURT: What was written above your signature? Do you recall what was written above your signature?

THE WITNESS: Yes, I recall.

THE COURT: What was written above your signature?

THE WITNESS: Exactly what it says there, and I signed it.

THE COURT: What does it say?

THE WITNESS: Should I read the whole paragraph there?

THE COURT: If you can't recollect it you may refresh your recollection.

THE WITNESS: Shall I read the paragraph out loud or to myself?

THE COURT: You can refresh your recollection and then answer the question.

THE WITNESS: Okay, I am reading it.

A I have read it.

Q Does it refresh your recollection as to the amount of money?

A Yes.

Q How much was it?

A No, I still say I had $9700 when I was arrested, but there is $8562.06 put here.

Q You signed a receipt for that? That is your signature?

A I signed it, yes.

MR. LAVIN: Your Honor, the Government would offer this 83 in evidence.

MR. LaROSSA: Objection.

THE COURT: On what ground?

MR. LaROSSA: I think if your Honor reads it you will understand.

THE COURT: I will read it.

MRS. ROSNER: On behalf of my client, your Honor, may I because it is post-arrest or at least may we have a limiting instruction?

THE COURT: This is cross-examination.

Let me see the document.

(Document handed to the Court.)

MR. LaROSSA: I have no objection to that one

portion of it, referring to money.

THE COURT: The objections are overruled. This document may be received against the defendant Mallah only.

(Government Exhibit 83 received in evidence.)

Q Mr. Mallah, I believe you also testified, did you not, that the reason you got the identification in the name Morris Geller was to enable you to get an apartment?

A An apartment and a phone. That's immediately what I did on getting the identification.

Q Which one did you do first?

A Pardon me?

Q Did you get the apartment or get the identification?

A Well, I got the apartment but I promised to bring in the identification at a later date.

Q Let me show you 74 in evidence. Tell us the date of the lease.

A August -- first day of August.

Q What day did you make the lease?

A I think I was there the first day of August or the second day of August. I don't recall.

Q What is the date of this application for a social security card, Government Exhibit No. 72.

A August 8.

Q August 8?

A August 7th.

Q Tell us the date of the -- the date you opened that bank book in the East New York Savings Bank.

A August 3rd. Because I promised to bring in documents to the leasing office later on that week.

Q You signed the lease before you brought the documents in?

A Evidently they weren't too particular at that office.

THE COURT: Is that your picture on the East New York Savings Bank?

THE WITNESS: Yes.

THE COURT: On August 3?

THE WITNESS: Yes.

THE COURT: When you opened an account in the name of Geller?

THE WITNESS: Yes.

Q You testified you never met a Mr. Pacelli?

A Never.

Q Did you go down to the barber shop often in 1971?

A I would say that was one of the years where I was there quite often.

Q I show you Government Exhibits 8 and 9. Can you tell us the background of those two pictures?

A Ballantine Hair Stylist and the dry cleaning store

next door.

Q Can you identify any of the persons in those pictures on Government Exhibit 8?

A I see Herbie Sperling, is the only positive identification I can make. Here he is standing on the corner.

Q What about this person here wearing the sun glasses?

A No.

Q And Government Exhibit 9?

A On, this person looks familiar around the avenue but as far as knowing him, I don't.

Q That is Louis Mileto. Do you know Louis Mileto?

A I never met him.

Q Never met Louis Mileto?

A Never met him.

Q Government Exhibit 9, what is the background on Government Exhibit 9?

A The same background, the record store, the cleaners and the hair stylists.

Q Can you identify any of the persons in that picture?

A There is only one person here that I can identify right now.

Q Who is that?

A Mr. Pacelli standing there. He is standing on the curb here.

Q You didn't know him in 1971?

A No.

Q You didn't know Mr. Mileto?

A Didn't know him formally or I may have seen him. I see thousands of people on the avenue every day.

Q Did you ever see him down the barber shop?

A Pardon me?

Q Did you ever see him down the barber shop in 1971?

A It is possible, but never met him formally or spoke to him.

Q You don't recall ever seeing Mr. Pacelli down the barber shop in 1971?

A To the best of my recollection, no.

Q You said you never met Mr. Mileto?

A Never met him.

Q How often did you go down to the barber shop in 1971?

A That was the year that I was there quite often.

Q Did you know Mr. Sperling at that time?

A Yes. That was the beginning of our relationship.

Q Did you ever socialize with Mr. Sperling?

A Just once I was out to his house. He had a house-warming in Belmore.

Q Did you ever go out to eat dinner with him?

A Well, I had a snack with him at the Stage, if you would call that dinner. I don't know.

Q Did you ever go up to the Bronx, Mr. Mallah?

A I've been up to the Bronx many times.

Q Have you ever been in the Havermyer Club?

A Not that I recall.

Q Do you know an individual named Leo Guarino?

A Not under that name. Under -- I know a Leo, but not under Guarino.

Q Do you know who I am talking about?

MR. LaROSSA: Objection.

THE COURT: Overruled.

A If it is the same Leo, I think -- I don't know. I know quite a few Leos, but Guarino doesn't strike a bell.

Q Let me show you Government Exhibit 60. It is the sixth page and it is the first photograph on the sixth page. Can you identify any of the people in that picture?

Why don't you move it over into the light.

A Yes; yes, two people here.

Q Who is that?

A I see Herbie Sperling talking to -- it looks -- I'm not sure, though -- it looks like Leo here. I couldn't be positive.

Q Who do you know that person as, the person talking

to Mr. Sperling?

A Pardon me?

Q What do you know him as?

A I'm not sure if it's the person.

Q What is his name?

A Leo.

Q Leo. You said you had never been down to Spring Street, Mr. Mallah?

A Pardon me?

Q You have never been down to Spring Street?

A I've been down to Spring Street all my life.

Q Have you ever been down to 5 Spring Street?

A Never.

Q Were you ever down -- on July 30, 1971, were you and Mr. Sperling in 5 Spring Street?

A Never. I could never recall what I did July 30, 1971, but I know I was never in --

Q All right. I withdraw the day. Your testimony is that you were never in 5 Spring Street in 1971?

A In the building 5 Spring Street.

Q You were in the building?

A In the building, I was never in 5 Spring Street.

Q I'm sorry, I don't understand.

A You are saying No. 5 Spring Street?

Q 5 Spring Street.

A I was never inside No. 5 Spring Street.

Q Isn't it a fact that on July 30, 1971, you, Mr. Sperling, and Mr. Mileto were in 5 Spring Street?

A That is not a fact.

Q Were the windows in your apartment taped up at 66th Street?

A Taped up?

Q Were the window shades taped?

A No, I had stationary drapes, you would call them. They weren't taped. They were just stationary.

Q You knew an individual named John Ramos?

A Not that -- I don't recollect anybody called John Ramos.

Q Did you ever lend Mr. Sperling money?

A Never loaned him money.

Q No?

A Never loaned him money.

Q You testified that you never received any money from Mr. Sperling whatsoever?

MR. LaROSSA: Objection.

MR. LAVIN: I withdraw it.

Q Did you ever receive money from Mr. Sperling?

A Yes.

Q What amounts?

A I think I testified I would say the largest amount was $1500 on a gambling -- a gambling debt.

Q You testified you never knew Cecile Mileto; is that right?

A That's correct.

Q Did you ever give her your furniture, a couch?

A Never.

Q You never gave her a couch. Mr. Mallah, let me show you 61-A through 61-D. You have already looked at those pictures.

A Yes.

Q And you have identified the persons in them.

A Yes.

Q There's been testimony these pictures were taken on August 16, 1971. You testified that you never had a conversation with Mr. Sperling about "stuff" and "'50 thou"?

A Never.

Q Let me show you Government Exhibit 3561. Would you read that, please, and see if it refreshes your recollection? Just read it to yourself.

A I have read it.

Q Does it refresh your recollection as to a conversation you had with Mr. Sperling on August 16?

A Not in that context. Not where it is, neither.

Q Do you recall a conversation with him on that day?

A Well, I don't know if it was -- the testimony says August 16, yes.

Q Does that refresh your recollection in any way about a conversation you had with Mr. Sperling?

A There were a number of conversations. If it happened on August 16, I concede it happened on August 16.

Q No, I'm sorry --

THE COURT: Is your recollection refreshed about that conversation?

THE WITNESS: There is nothing in this conversation, the way it is written here, or typewritten here, that refreshes my recollection that this was discussed between us. Nothing in it. Maybe one sentence, probably.

THE COURT: What is the one sentence?

THE WITNESS: Like if I owed him money and he said I must have it by tomorrow. If I owed him any money. Or it could have been said to me where I needed the money. That could be the only possible sentence.

Q It is your testimony, then, that you never had this conversation with Mr. Sperling?

A Yes.

Q On August 16?

A I may have had a conversation on August 16. I don't dispute that, but not in that --

Q And that you never said to Mr. Sperling, "I got to have the stuff"?

A Never. I said to Mr. Sperling, "I got to have the stuff"?

Q No. He said it to you. I'm sorry.

A Never.

Q And you never said to him on that date, "Don't worry about it, I will see the people later on"?

A Never.

Q Do you recall him saying to you "50 thou; right"?

A Like I said before, I never heard the expression "thou."

Q Never did?

A Unless it was in the movies. Not amongst the people that I did business with in gambling parlance, never heard the expression "thou."

Q I believe you said you don't know Mr. Conforti?

A I don't know Mr. Conforti.

Q You have never seen him?

A Not until he took this stand.

Q Did you ever see him down in the barber shop in 1972?

A Never. I may have seen him, but I don't remember him. That barber shop that was -- there are thousands of people come in there. I don't remember 25 minutes after they leave. In fact, some of them I can converse with or --

Q Have you ever been down to Mott Street with Mr. Sperling?

A Mott Street, yes.

Q Do you recall having a conversation with him about risk and "I'm only getting a few bucks out of this" in 1972?

A I don't recall that conversation.

Q No?

A No. In fact, I don't recall any conversation with Sperling aside -- unless it pertained to the betting or games or --

Q You never had any narcotics conversation with Mr. Sperling?

A Never.

Q You testified this $8500, which is partially yours --

A Yes.

Q You say there is more, is money from --

A The night of my arrest.

THE COURT: Now wait. We haven't got the question yet.

THE WITNESS: I'm sorry.

Q This is money from gambling; is that right?

A Yes, the entire proceeds is from gambling.

Q Do people usually pay off your gambling debts in hundred-dollar bills?

A The type of gambling I was doing at the moment.

Q There is approximately $7300 in hundred-dollar bills there?

A Yes, the type -- well, they didn't have to pay off that way. If I needed $500 I would change $500 into smaller money.

Q This is not from narcotics, is it, Mr. Mallah?

A No.

Q Were you wearing a toupee in 1971?

A '71?

Q Yes.

A I am trying to remember the last hair transplant I took. The last time -- I wore a toupee immediately after I stopped my hair transplants, and I just can't remember if it was '70, '69, '70 or '71. I mean '69 or '70. I can't recall, but I remember I stopped the transplants. They were too painful and too expensive.

Q When did you buy this particular toupee that was in your apartment?

A I don't recall which one that is. I had two of

them. One was two years old and one was approximately a year old.

Q I show you Government Exhibit 74.

A Yes.

Q That is the identification card for East River Savings Bank?

A Yes.

THE COURT: What date?

THE WITNESS: August 3rd.

Q August 3, 1973. That is you in that picture?

A Yes, it is.

Q Is there any particular reason why you would have your picture taken with a toupee on?

A It was just my period for wearing a toupee.

Q It wasn't for the fact --

A I am very self-conscious. I am very self-conscious about my baldness. I went through painful --

Q You never wore a toupee down --

A In Florida?

Q No. Down in the barber shop, did you?

A No, I was kind of embarrassed to wear one there. They all encouraged me to go for the hair transplants. That's why.

Q So you got this bank book in the name of Morris

Geller with a wig on and a moustache because you were self-conscious?

A Yes, I have been -- especially in pictures I am self-conscious. I like to take a good picture.

Q And you applied for a social security card in the name Morris Geller?

A Yes.

Q Why did you do that?

A As a means of identification under that name.

Q You didn't want to use your own name?

A No. The purpose of that was to get a phone. I immediately went down to the phone company to establish --

Q Were you living in New York under your own name during --

MR. LaROSSA: I object to the question not being allowed to be answered.

MR. LAVIN: I'm sorry.

THE COURT: Go ahead if you haven't finished your answer. Finish it.

THE WITNESS: I think I finished it.

THE COURT: He says he thinks he finished it.

A I established identification to get the things that you need with identification. Telephone, or --

Q Why didn't you use your own name, Benjamin Mallah?

That is your true name, isn't it?

A Yes. Because of the business I was in, which for years I have used assumed names to get apartments. I have had various apartments throughout the years.

Q Did you have a conversation with Nancy O'Malley in Florida on April 15, 1973, and didn't you tell her there was some trouble?

A It could have been the 15th; 14th, 15th or 16th. I'm not sure.

THE COURT: He wants to know did you have that conversation.

A Yes, I told her I had a problem. I don't think I used the word "trouble."

Q What was the problem?

A The problem was that I had received word that there was a subpoena for me in a bookmaking investigation in Florida.

Q In Florida?

A Yes, the second winter in a row.

Q It is not because a bench warrant was issued for your arrest in New York two days before that, was it?

A I never knew nothing --

Q April 13?

A -- knew nothing of a bench warrant.

Q Did you know Mr. Sperling had been arrested on

April 13, 1973?

A I did not know on April 13.

Q When did you find that out?

A I read something in the papers about it. It could have been some time after the 13th, a few days after the 13th, it could have been.

Q Did you see your name in that paper?

A Never saw my name in that paper.

Q You never bothered to find out whether you had been indicted?

MR. LaROSSA: Objection.

A Why should --

THE COURT: The form of the question is objectionable.

Q Did you know that Mr. Goldstein had been indicted?

A No, I failed to see his name. The paper that I read.

Q What names did you see?

A I noticed Herbert Sperling.

Q Was that all?

A That's the only name that was recognizable to me.

Q This was a couple of days after you--

A A few days, a good few days, possibly a week later.

Q So then you came back to New York?

A I bought the New York Post.

THE COURT: You bought what?

THE WITNESS: The New York Post and the New York News. I used to get them daily in Florida.

THE COURT: Have you got the copies?

THE WITNESS: No, I haven't got the copies.

Q So you came back to New York?

THE WITNESS: I never held them.

Q Go ahead, finish.

THE WITNESS: I never held them more than one day.

Q So you came back to New York three months later under the name of Morris Geller with a toupee and a moustache?

A I came back three months later?

Q Well, in August. I'm sorry, five months later.

A I came back to New York the next week. I checked in at the Alrae.

Q Under what name?

A David Barton. I check in in various hotels before the Alrae.

Q Why did you check in the hotel under the name David Barton?

A I was using David Barton which I had used for years.

Q Why did you bother getting new identification for Morris Geller?

A David Barton had expired, and David Barton was

being wanted, was being served a subpoena in Florida. I had fear of --

THE COURT: In what --

A -- either Ben Mallah or David Barton --

THE COURT: In what month did David Barton expire?

THE WITNESS: May of last year.

THE COURT: But you say that you came back a few days after April 18?

THE WITNESS: Yes.

THE COURT: It had not yet expired?

THE WITNESS: It had not, no, but I didn't apply for Morris Geller until August 18 -- until August 1, rather.

Q I --

THE WITNESS: David Barton had expired.

Q Let me show you Government Exhibit 78. Do you recognize this yellow thing, State of Florida?

A Yes.

Q What is that?

A It is a receipt for sales tax on a motor vehicle.

Q Is that yours?

A Yes.

Q What is the date on that, Mr. Mallah?

A 4/19/73.

Q April 19th?

A Yes.

Q Did you make any telephone calls from Mrs. O'Malley's apartment during April 13 to the 16th, 1973?

A I made calls from her apartment every day.

Q Did you call New York?

A I called New York practically every day.

Q Who did you speak to?

A My sister, my mother.

Q Did you speak to anybody in the Stage Delicatessen?

A Possibly.

Q Anybody at the Stage Delicatessen tell you you had been indicted?

A No. Not a human being told me I was indicted.

Q You never found that out until you came back to New York in August that you had been indicted?

A I never found out that I had been indicted until I was arrested that night at 420 East 66th Street. I still didn't know that night. I knew the next morning at an arraignment.

Q Didn't they show you an arrest warrant when they arrested you, Mr. Mallah?

A They showed me nothing. They handcuffed me, threw me on the bed.

Q And stole your money?

A I am not accusing them of theft. I am just stating what I thought I had. I didn't accuse a human being of theft.

Q Do you ever recall being down in Spring Street in 1971 and seeing Louis Mileto come upstairs in the night time?

A I'm sorry, I didn't wait for the question. I never saw Louis Mileto in my life.

Q You've never been up in -- you have never been in 5 Spring Street?

A I've never been in the building, upstairs in the building at 5 Spring Street. I have been on Spring Street, since 1950 I have been going in that area.

Q Have you ever been in the lobby of 5 Spring Street?

A I can't -- I can't picture myself going beyond -- I know that area very well. I can't picture myself going beyond Mott Street, and 5 would be right near the Bowery. I just can't -- I just didn't know anybody up in that part of Spring Street.

Q You knew Herbert Sperling, didn't you?

A Pardon me?

Q You knew Herbert Sperling, didn't you?

A Yes, I knew Herbie Sperling.

Q You were pretty good friends with him, weren't you?

A Not until about a year after we knew each other, we had seen each other on the avenue.

Q When was that?

A Maybe two --

Q When was that?

A I don't know exactly. When we first became friendly? The exact date? I don't see how anybody can measure that.

Q How long did you know him?

A I said approximately three or four years. Maybe less. I'm giving you the maximum.

Q In all that time you were never up to his house?

A I was out to --

Q In Spring Street?

A I was out to his house-warming in Bellmore.

Q Were you ever up to his house in Spring Street?

A No.

Q His apartment?

A No.

Q Do you recall Mr. Sperling giving you $75,000 in an attache case?

A I never saw $75,000 in my life in its entirety at one time.

Q How long did it take to collect this $8,000 that you were arrested with?

A I have had between 3 and 11, 12 thousand for about a period of I'd say two years. The lowest I had would be

3 and the highest I'd have would be about 13; 12, 13 possibly go up that high.

Q In cash at any one time?

A Pardon me?

Q In cash?

A In cash.

Q What would you do with the money?

A That was my operating -- my operating bankroll.

Q Do you know an individual named Nicholas Lugo?

A Not under that name.

Q Let me show you a picture, Mr. Mallah. Let me show you Government Exhibit 62, and on the first page would you look at that person there and see if you can identify him?

A I think I'm going to need a little light.

This picture here?

Q Yes.

A I can't identify anybody there.

Q What is the background of that picture? Can you tell?

A I think it's the same background, the barber shop.

Q Ballantine's?

A Yes.

Q Have you ever been in the Stage Delicatessen with Mr. Barrett?

A Mr. Barrett?

Q Yes.

A Yes, we have had coffee and sandwiches on numerous occasions.

Q Was there anybody else with you on those occasions?

A Possibly, could be any amount of people, any number of people.

Q Who would that be? Can you give us some names?

A Any friend of ours that was around there.

Q Mr. Sperling?

A Mr. Sperling could have sat with us, but I don't recall him sitting with us at the same time, or the three of us together.

Q You don't recall that?

A No.

Q Do you recall eating in the Stage with Mr. Sperling?

A At least 10 or 12 times.

Q Was Mr. Barrett ever with you when you were eating?

A Either he was at the same table or the next table. The Stage is a very compact place, very compact. If somebody is sitting across the aisle from you it's like they're eating with you. That's how compact it is. In fact, they sit down -- the Stage has a seating arrangement where strangers sit together. If you take a table for four alone, they will sit

three people that you never met in your life to sit down with you, because of the scarcity of tables.

Q Do you recall being in my office on April 17, 1973, Mr. Mallah?

MR. LaROSSA: Objection.

MR. LAVIN: Withdraw it. I will rephrase the question.

Q Do you recall being in the United States Attorney's office on April 17, 1973?

A I couldn't give you a date. I recall being in the United States Attorney's office.

Q The day you were arrested or the day after?

A Well, I was in such a state of shock I never paid attention to dates.

THE COURT: No, he is asking you a specific question. Answer the question.

THE WITNESS: Oh, I'm sorry. I'm sorry.

THE COURT: Were you there on the day after your arrest?

THE WITNESS: Yes. Was it the day after? I was arraigned the day after? Yes, it had to be the day after, right.

Q Do you recall being interviewed?

A Yes, I recall.

Q Do you recall being advised of your rights?

MR. LaROSSA: Objection.

THE COURT: Well, you may go through the longer form.

Q Do you recall being advised you had a right to refuse to answer any questions asked you?

MR. LaROSSA: Objection.

THE COURT: Overruled.

A Yes, I recall. That day I recall receiving that.

Q Do you recall being told that you had an absolute right to remain silent, and if you chose to answer any questions, any statement you made could be used against you in a court of law?

MR. LaROSSA: Objection.

THE COURT: What is the specific ground of the objection?

MR. LaROSSA: May it please the Court, do you want me to state?

THE COURT: Yes, this is cross-examination on the issue of credibility.

MR. LaROSSA: Yes, sir, I know.

THE COURT: Do you want to call my attention to anything specific?

MR. MITCHELL: Your Honor, on behalf of Barrett, may we have a limiting instruction?

THE COURT: I don't think it is necessary for you gentlemen to keep on getting up to draw particular attention to your own clients. This examination is being conducted certainly in this phase of it as to the defendant Benjamin Mallah.

MR. LAVIN: May I write a note as well?

THE COURT: Yes.

Aren't you anticipating? Aren't you anticipating a later question? You've gotten a little ahead of the questioner?

MR. LaROSSA: No, sir. I don't think so.

THE COURT: It seems so to me.

Do you have something to hand up?

MR. LAVIN: Yes, your Honor (handing).

THE COURT: This is marked Court's Exhibit 44.

(Court's Exhibit 44 marked.)

THE COURT: Show it to Mr. LaRossa.

MR. LaROSSA: I have seen that, sir.

THE COURT: Get right down to the question that you want to ask, Mr. Lavin, and I think that that may eliminate the difficulty.

Q Do you recall stating on that occasion that you never heard you were indicted until the time of your arrest?

A I recall saying that.

Q Do you recall also saying that you knew Herbert Sperling four or five years?

A I said four or five years, but I'm pretty sure I'm closer to three. If I said three or four years, it would be closer, much closer.

Q Do you also recall stating that Mr. Sperling placed bets with you, his personal bets?

A He placed bets with me, right.

Q Do you also recall stating that you never used the name David Barton?

A Pardon me?

Q Do you also recall stating that you never used the name David Barton?

A I never recall stating I never used the name David Barton.

MR. LAVIN: May we have this marked Government Exhibit 84.

(Government Exhibit 84 marked for identification.)

Q Let me direct your attention to that portion of it and ask you if that refreshes your recollection. Just read it to yourself.

A I am reading it.

Q Does that refresh your recollection?

A I am reading it. Yes.

Q I'm sorry. Does it refresh your recollection?

A As to whether that was asked of me?

Q No, as to whether you stated that you never used the name David Barton.

A It refreshes my recollection, I never stated that.

Q You never stated that, but you did remember stating that you never heard you were indicted until the time of your arrest; is that right?

MR. LaROSSA: Objection. Argumentative.

THE COURT: Overruled.

Is that right?

THE WITNESS: That I was --

THE COURT: That you hadn't heard you were indicted until you were arrested?

THE WITNESS: Correct. Arrested -- excuse me. Can I clarify this a little? You mean by arrested, you mean in the apartment, arrested in the apartment? Did I know that I was indicted? Or when I was brought to 57 -- there is a time gap there.

THE COURT: The question was whether you informed the United States Attorney that you did not know that you had been indicted prior to the time that the officer came to see you at your apartment.

THE WITNESS: That's correct. I did not.

Q Do you recall stating that on the day this interview was taken; is that right?

A Right, that I did not -- I did not -- I wasn't aware of being indicted prior to the officer's coming to the apartment.

Q Do you also recall stating you didn't think you could get an apartment under your own name, that's why you rented -- that's why you changed your name or got identification in the name of Geller?

A I stated -- I stated that I used -- identification.

THE COURT: He is asking you a specific question.

THE WITNESS: I'm sorry.

THE COURT: Did you state in words or substance that the reason why you used the name Geller was you couldn't get an apartment in your own name?

THE WITNESS: I could have stated it in that -- possibly I said it in that way.

Q Do you also recall stating that you opened the bank account and got this application for the social security card after you got the apartment?

A Yes, but I had promised the --

Q Do you recall stating that?

A Yes.

Q Do you also recall stating that you had $8500 on

your person when you were arrested?

A Yes.

Q You did?

A Yes, I did.

Q Did you tell anybody at that time that you had $9700?

A I told my attorney a week later.

Q When you were interviewed, didn't you tell anyone at that time?

A I didn't want to. My prime concern was --

Q Didn't you think it is a little unusual that the amount of money that is in here is --

MR. LaROSSA: Objection.

THE COURT: No, please.

MR. LAVIN: I'm sorry.

Q Do you also recall stating that you never reported any of the money you made from gambling?

A Reported any money that I made from gambling?

Q Any of the money that you made from gambling.

A Yes.

Q Do you recall stating that?

A That I never reported it where?

Q On taxes.

A Oh, no, I never --

Q Do you remember stating that?

A I don't remember stating it, but I will state it right now.

Q Do you also recall stating that from April to July 1973 you were traveling?

A April to July 1973? Yes, that I was traveling. No; that I traveled considerably.

Q Do you also recall stating at that interview that you lived at the Sea Air Apartments in Florida?

A Previous to April of '73, yes.

Q Do you also remember stating that you lived at 300 West 49th Street for a period and you paid $94 a month rent?

A Yes.

Q And you also recall stating that when you lived at 420 you paid $200 a month rent?

A Yes.

Q But you don't recall stating that you never used the name David Barton? Is that your testimony?

A That's my testimony.

Q Did I ask you at that time about your record?

MR. LaROSSA: Objection.

Q If you had a record?

MR. LaROSSA: Objection.

THE COURT: Sustained.

Q Do you recall stating to me that in 1969 you were convicted for making a false statement on a bank loan?

A I recall saying that, yes.

Q Is that the truth?

A Yes, that is the truth.

Q Did you get two years probation for that?

A I got two years probation.

MR. LAVIN: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. LaROSSA: Yes, there is.

REDIRECT EXAMINATION

BY MR. LaROSSA:

Q Mr. Mallah, tell us about the conviction for making a false statement to a bank, please. When was it?

A Approximately 1969, around that area.

Q What did it involve?

A Well, I went for a bank loan. I used my right name, my right address, but I lied about the earnings that I made at a job. I put down a false report that I had a job and that I earned.

Q How much was the loan for?

A $3500.

Q Was the loan repaid?

A Eventually it was repaid. Took a long drawn-out process. Eventually it was repaid.

Q Do you owe any money to places like finance companies at the present time?

A Yes, I owe money. I owe Household Finance.

THE COURT: Is this proper redirect?

MR. LaROSSA: Just based upon that one -- the 1969 question that was being asked. That is the purpose of my bringing this out.

THE COURT: I don't think there is any relationship.

MR. LaROSSA: May I write something, please?

THE COURT: Just ask your questions.

MR. LaROSSA: Is that question sustained, the objection?

THE COURT: In that form it is sustained, yes.

Q Did you in 1969 owe money to finance companies?

A Yes.

Q Did you have judgments against you?

A Yes.

Q Do you now owe money to finance companies?

A Yes.

Q Do you presently have judgments against you?

A Yes.

Q When you were interviewed on the day after arrest,

were you asked how you received your money, how you earned money?

A Yes.

Q Did you tell them by gambling?

A Yes.

Q Did you state on that day that you knew Mr. Sperling?

A Yes.

Q Did you state on that day that you had received bets from Mr. Sperling?

A Yes.

Q On that day of the arrest, were you with an attorney?

A No.

MR. LAVIN: Objection.

THE COURT: Well, this is the area that you blocked out, Mr. LaRossa. Now you are opening it up on redirect.

MR. LaROSSA: If you will let me ask one more question you will see it has nothing to do with that.

THE COURT: All right, but that particular question had something to do with it. But go ahead with your next question.

Q Had you talked to a lawyer prior to the time you were asked these questions and gave these answers?

A You mean right in that period of time?

Q Yes.

A In that frame of time?

Q Yes.

A No, I had no attorney.

Q Were you asked at that time, sir, whether you knew that there was a bench warrant that had issued for you in April 1973?

A I think I was asked that.

Q What did you tell them?

A That I didn't know, I had no idea at all.

Q When was the first time you found out that you were indicted for conspiracy to violate the narcotics laws?

A Well, It's hard to say. I know I did not know in my apartment, when I was handcuffed. I possibly knew up in the 57th Street office where they took me. I possibly knew, it just came to me then.

Q Did you see any of the agents pick up what has now been marked Exhibit 78, the David Barton papers, on the night of your arrest?

A I couldn't be sure if I saw. They had me handcuffed from behind, my hands --

THE COURT: Never mind all of that. Just answer the questions.

THE WITNESS: Oh, I'm sorry.

A I'm not sure if I saw them pick it up.

Q Were you asked a number of names that day and whether or not you knew them or not? Do you remember it, for examples, Jack Bless?

A I remember being asked. I don't recall the names, no, but I remember being asked a number of names.

Q Did you know Jack Bless?

A Never, no.

Q Is that what you told them?

A Yes.

Q Did you tell them that you knew Herbert Sperling?

A Yes.

MR. LaROSSA: I have no further questions.

MR. DUKE: Your Honor, I have a question or two opened up on cross.

THE COURT: Go ahead.

BY MR. DUKE:

Q Mr. Mallah, I believe you testified that, showing you Government Exhibits 8 and 9, that one of the persons in one of these pictures looks like Pacelli?

A Looks like him.

Q Which one?

A This one against the --

Q Number 9?

A Yes.

Q Were you influenced by the red -- by the fact that his name appears on it?

THE COURT: I don't think that is a proper question. Don't ask questions whether people are influenced.

Q When you answered that question, did you look -- did you see the name that was written on there?

A Immediately I saw the name and the arrow pointing, immediately.

Q If the name Smith were on there, would you still identify that person as Pacelli?

A Not as easily.

MR. LAVIN: Objection.

THE COURT: Not as easily. Is that what you said, not as easily?

THE WITNESS: I would think so.

Q Could you make a -- if you can disregard the name on there, would you look at that picture and tell me whether you are positive that that's Vincent Pacelli?

MR. LAVIN: Objection, asked and answered.

THE COURT: He may say whether he is now positive that's it.

A Actually, now that I keep looking, I can't be positive.

Q In your testimony --

A I would say it looks like him.

Q Looks like him. Your testimony is based simply on comparing what's in the picture with what you see?

A That's all. That's the only thing it is based on.

MR. DUKE: Thank you.

THE COURT: Any other questions?

MR. LAVIN: Just one, if I may, Your Honor.

RECROSS EXAMINATION

BY MR. LAVIN:

Q Do you recall on August -- April 16, 1972 making a phone call from Florida to New York?

MR. LaROSSA: Objection.

Q To ask Mrs. Goldstein --

MR. LaROSSA: Objection. Improper recross.

THE COURT: It is an extension of the same subject I think that you probably already asked the question.

MR. LAVIN: I asked a different person.

THE COURT: You didn't name the person?

THE WITNESS: No, he didn't name.

THE COURT: In the last question you didn't. All right. This time he's adding the name Goldstein.

Did you make the call to Goldstein.

THE WITNESS: I couldn't -- I could never recall the exact day I made the call.

Q Do you recall calling Goldstein around that time?

A Very possibly, yes.

Q You knew Sonny Goldstein for 20 years, didn't you?

A 25 years.

Q Did you call his wife around that time?

A It could have been around that time. I don't recall the exact time.

Q Did she tell you that Mr. Goldstein --

A This call -- you say April 16?

THE COURT: Around April 16.

Q Just about the time you left Mrs. O'Malley's apartment, around that.

MR. LaROSSA: I object to this.

A Very possibly I made that call.

THE COURT: The objection is overruled in the light of the way the testimony is developing.

A Very possibly I made that call.

Q Did Mrs. Goldstein or Mr. Goldstein mention that Mr. Goldstein had been indicted?

A No.

MRS. ROSNER: I am going to object, your Honor, to hearsay, on behalf of my client.

A I never had a discussion about an indictment.

THE COUST: This is all being taken as to the

defendant Mallah.

MRS. ROSNER: Thank you, your Honor.

Q Do you recall speaking with Mrs. Goldstein around then?

A I could have spoken to her in that period.

Q But you don't recall her saying that Sonny Gold -- you knew Mr. Goldstein by the name Sonny Gold?

A Yes, but she would never say, she would say Sonny or --

Q You don't recall her mentioning the fact that her husband had been indicted?

MR. LaROSSA: Objection to the form.

THE COURT: "Do you recall."

Q Do you recall?

A I don't recall that at all.

MR. LAVIN: I have no further questions.

THE COURT: Anything else?

You may step down.

(Witness excused.)

THE COURT: Anything else, Mr. LaRossa?

MR. LaROSSA: Defendant Mallah rests, your Honor.

THE COURT: All right, Defendant Pacelli?

MR. DUKE: May we have a brief recess?

THE COURT: Let's go right ahead.

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MRS. ROSNER: Your Honor, I have one witness waiting that I can put on to continue the testimony.

THE COURT: All right.

Is this going to be the Catino defense? You are going to go forward with all your side of it now, or are you just being accommodating?

MRS. ROSNER: I am being accommodating to Mr. Duke at this point.

THE COURT: I want these things taken completely. Are you ready to go forward completely?

MRS. ROSNER: Yes, your Honor.

THE COURT: Go ahead.

C A R L A B R A H A M , called as a witness for the defendant Catino, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MRS. ROSNER:

Q Mr. Abraham, please speak up very loudly. We are having some difficulty hearing.

Are you employed?

A Yes, I am.

Q What is the name of the business that employs you?

A Intercity Testing and Consulting Corporation.

Q Where is that business located?

A Executive offices at 3 Baker Hill Road in Great Neck.

Q What is your position with that company?

A Director.

Q What is the nature of the business?

A We are a consulting firm and we provide complete technical backup for the legal profession.

Q Would you tell the jury a little bit about your educational background in terms of your expertise in the sciences?

A Yes, I have a bachelor's degree in mathematics and chemistry, I have a master's degree in physical organic chmistry, and I have completed all my course work and research for my doctorate in physical organic chemistry.

Q Do you have any teaching affiliations?

A I am certified by the State of New York to teach chemistry, physics, mathematics, and general science, from junior high school to high school, and I am an associate professor adjunct at Nassau Community College in Garden City. I teach biochemistry.

Q I will show you what has been marked Government Exhibit 30 for identification. Let me caution you this is broken, so please handle it carefully.

Can you from an examination of it determine what that is, and please explain to the jury what it is?

A Yes. This is a thermometer, graduated in degrees

centigrade.

Q What is the top degree reading possible?

A Three hundred --

Q Please let me complete the question. What is the top degree reading possible on that thermometer?

A 360 degrees centigrade.

Q Let me show you what has been marked collectively Government Exhibit 54 for identification, and I ask you to examine the contents and tell the jury what's in Exhibit 54.

A These are thermometers graduated in degrees Fahrenheit with a maximum temperature reading of 300 degrees Fahrenheit.

Q Would you just look and see if there is any thermometer in that group that is not a Fahrenheit thermometer with a top of 300 degrees?

A All thermometers in this box have a maximum reading of 300 degrees Fahrenheit.

Q And they are all Fahrenheit thermometers?

A Yes.

Q Did I ask you earlier this afternoon to calculate in centigrade degrees what 300 degrees Fahrenheit equals?

A Yes, you did.

Q Did you do that calculation?

A Yes.

Q Expressed in centigrade degrees, what is 300 degrees Fahrenheit?

A 148.89 degrees.

Q Do you have those calaculations written out?

A Yes.

Q Can you very briefly explain how you arrive at 140 degrees?

A Sure.

THE COURT: I don't think we need to go into that kind of demonstration.

Q May I see your written-out calculation?

A This is a conversion and this is a calculation.

THE COURT: Is there any dispute about the conversion?

MR. LAVIN: I don't really know.

MRS. ROSNER: Let me show Mr. Lavin, your Honor, and perhaps we can resolve the matter.

THE COURT: I don't think you need go into the thing in any detail.

MRS. ROSNER: Then I would ask to have this marked.

(Defendant Exhibit R for identification marked.)

Q Is the paper which has been marked Defendant Exhibit R the calculation which you performed converting 300 degrees Fahrenheit to 148.89 degrees centigrade?

A That's correct.

Q To the best of your knowledge and in your expert opinion, is that an accurate calculation?

A Yes.

MRS. ROSNER: I would move its admission in evidence, your Honor.

THE COURT: Do you have to be an expert to know that the one can be converted into the other, or is that something that every school child gets hold of?

THE WITNESS: Every school -- everybody that is in school learns this converstion.

THE COURT: All right. Everybody in school learns it. We accept the exhibit.

Go ahead.

(Defendant's Exhibit R received in evidence.)

Q Did you similarly perform calculations converting 180 degrees centigrade into Fahrenheit measurements?

A Yes, I did.

Q What does it come out to be Fahrenheit?

A 356 degrees Fahrenheit.

Q Is it fair to state then that a thermometer with a top grade reading of 300 degrees Fahrenheit could not measure 180 degrees centigrade?

A Oh, it is impossible.

Q So that if a person measured hot mineral oil at 180 degrees centigrade, could he use a 300 degree Fahrenheit thermometer for that measurement?

A No way.

Q If a person used a thermometer to measure hot mineral oil or any other substance at 230 degrees, could you use a 300 degree Fahrenheit thermometer for that purpose?

A No, a 230 degree centigrade is equivalent to 446 degrees Fahrenheit. It is impossible to use a thermometer that has a maximum of 300 degrees Fahrenheit.

Q Is it fair to state without getting into the exact mathematics of it that there is approximately a two to one ratio between centigrate and Fahrenheit measurement?

A Approximately.

Q So that approximately 200 degrees on a centigrade thermometer is 400 degrees on a Fahrenheit thermometer? Is that approximate if not mathematically accurate to the degree?

A It is not mathematically accurate. It is approximate.

Q Did you similarly perform written-out calculations of the conversions from 180 degrees centigrade and whatever the answer is in Fahrenheit measurements?

A Yes. At 180 degrees.

THE COURT: I think we have already had that.

MRS. ROSNER: I would merely like to mark, your

Honor, the exhibits on which those calculations are written out and to offer them.

THE COURT: I don't see any point to it because the witness has already said it is on a two to one basis, which means that if you have 150 degrees of centigrade, you are going to have about 300 degrees of Fahrenheit.

THE WITNESS: Approximately.

THE COURT: And at what point does mineral oil heat up on the Fahrenheit scale?

MRS. ROSNER: I don't understand the question, most respectfully, Judge.

THE COURT: What is that?

MRS. ROSNER: I don't understand the question.

THE COURT: Maybe the chemist understands me.

THE WITNESS: I think what you are trying to ask is at what point does it start vaporizing.

THE COURT: No, I want to know in the words of the lawyer at what point does it get hot.

MRS. ROSNER: I didn't ask that, Judge, most respectfully. I have asked my questions, your Honor, based on the evidence in the record.

THE COURT: All right.

Q May I have the calculation which converts 180 degrees centigrade into Fahrenheit?

A Yes.

Q May I have the one which converts 230 degrees centigrade into Fahrenheit?

A Yes.

MRS. ROSNER: I would like to have these marked, your Honor.

THE COURT: Any objection?

MR. LAVIN: No, your Honor.

THE COURT: All right, received.

(Defendant's Exhibits R, S and T received in evidence.)

MRS. ROSNER: I have just two other questions, your Honor.

Q Mr. Abraham, to the best of your knowledge, could any of the thermometers in Government Exhibit 54 be employed --

A No way.

Q Just a moment please. -- to measure the temperature --

THE COURT: Do you know what question she wants to ask?

THE WITNESS: It does not matter. Yes.

THE COURT: You can't use these thermometers?

THE WITNESS: There is no way whatsoever to measure anything over 300 degrees.

THE COURT: She hasn't asked you that.

Q Let me put the question, please. Don't anticipate.

THE COURT: Step down, Mrs. Rosner.

Q Is there any way by employing the thermometers in Government Exhibit 54 that an individual could measure what would be equivalent in centigrade degrees to 180 degrees centigrade?

THE COURT: You asked that question. He told you that if you go over 300 Fahrenheit you can't measure it. Why are you asking it again?

MRS. ROSNER: I merely want to ask the question using the centigrade numbers to make my point.

THE COURT: You brought out it is two to one. It seems to me we are wasting a lot of time.

MRS. ROSNER: I just want to bring out my point.

THE COURT: I know what you want to do.

Q Could you use those thermometers, Government Exhibit 54, to measure the equivalent of 150 degrees centigrade or any number above that?

A No, it is impossible to do that.

Q Would the thermometer break?

A It depends how much above the 300. There is a good possibility it can break.

Q But it wouldn't register above 300 Fahrenheit?

A Just as far as reading, it is impossible.

MRS. ROSNER: Thank you, I have no other questions.

THE COURT: Any cross-examination?

MR. LAVIN: Yes.

THE COURT: Any further direct testimony?

MRS. ROSNER: I have no other questions.

THE COURT: Any cross-examination?

MR. LAVIN: Yes, your Honor.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Mr. Abraham, can you tell me what the use of a Government Exhibit 30 is, the centigrade thermometer? What is that used for? It is broken.

A This is used for measuring the temperature of anything in the environment to a liquid. In other words, you can measure the temperature of air or you can measure the temperature of a liquid, up to a maximum of 360 degrees centigrade.

Q But they are specifically designed for a special purpose, are they not, those thermometers?

MRS. ROSNER: Objection, your Honor. If he knows.

Q If you know.

THE COURT: Please don't do that.

You may answer. Are they designed for a special purpose?

A The purpose of a thermometer that has a maximum of

300 degrees centigrade, the primary purpose is to use it within this range.

Q For doing what, for testing?

A It can be for anything.

Q For testing? Well, it's not used to tell the weather, is it? It is a chemical thermometer, isn't it, for use in testing?

A No, there are many people that I know that don't use it just in the area of chemistry. It is used in many other areas.

Q Such as what?

A Physics, biology.

Q It is a scientific thermometer, let me put it that way?

MRS. ROSNER: I am going to object to the characterization, your Honor.

THE COURT: Overruled.

A It is available to the general public.

THE COURT: It certainly is not used for measuring the heat of a person's body, is it?

THE WITNESS: This I am not aware or.

Q Did you ever see any of these thermometers before, Mr. Abraham?

A Yes.

Q Do you have any idea what they cost?

A It depends. You can get them for a dollar, two dollars.

Q You can get this thermometer for a dollar or two dollars?

A Yes.

Q Look at it, please.

A Yes, I did look at it.

Q You can get it for a dollar or two dollars?

A Couple of dollars.

Q What would these Fahrenheit thermometers be used for?

A They can be used for the same thing only it is easier to read the air temperature or the environmental temperature using a Fahrenheit thermometer, because more people understand Fahrenheit than they do centigrade.

Q I don't understand what you mean by "environmental." You mean the temperature outside?

A Yes.

Q Someone would use a 300 degree Fahrenheit thermometer to tell the temperature outside? Am I wrong in --

A Well, sure, you can --you don't have to use the maximum of 300 degrees.

Q Would somebody go out and buy this thermometer to use to test the air or the heat?

MRS. ROSNER: I am going to object to the form of the question.

THE COURT: Yes, the form is bad.

Is that the ordinary use of a thermometer with a 300 degree level, to use it to see how hot and cold it is outside?

THE WITNESS: Not all the time. There are people who do; thermometers come in various degrees.

THE COURT: Is that all, Mr. Lavin?

MR. LAVIN: That is all.

MRS. ROSNER: I have one question on redirect.

REDIRECT EXAMINATION

BY MRS. ROSNER:

Q What is the bottom of the scale on the Fahrenheit thermometer, which is marked Government Exhibit 54. What is the lowest degree reading?

A I can't see that. May I see it?

MR. LAVIN: I will hand it to you.

A Zero degrees, centigrade, which can be -- you can stick one of these in your refrigerator to make sure that the freezer is at the right temperature.

MRS. ROSNER: Thank you, I have no other questions.

THE COURT: You may step down.

(Witness excused.)

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THE COURT: Any other witnesses, Mrs. Rosner?

MRS. ROSNER: No, at this time the defendant Catino rests.

THE COURT: Defendant Catino rests. All right.

Defendant Pacelli?

GLORIA BROOK LULOFF, called as a witness by the defendant Pacelli, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DUKE:

Q Miss Luloff, where are you employed?

A Excuse me?

Q Where are you employed?

A Alley Cat, 1409 Broadway.

Q What is your occupation?

A Sales manager.

Q What kind of an institution is the Alley Cat?

A It is a junior sportswear, ready-to-wear firm. They manufacture clothes.

Q Is that in the garment district?

A Yes, it is.

Q How long have you worked in the garment district?

A In the garment district itself I have worked almost about eight years in this company.

Q Can you speak a little louder?

A In the garment district itself I have worked close to almost eight years for this company, I am here almost four.

Q Do you know Susan Weyl?

A Yes, I do.

Q How long have you known her?

A Close to seven years.

Q Did she ever work in the garment district when you were working there?

A Yes, she was.

Q When was that, approximately?

A Approximately about four years ago, maybe. I'm not sure exactly.

O Did she attend your father's funeral?

A Yes, she did.

Q How many times have you seen her? How long did you say you know her?

A Close to seven years.

Q How many times have you seen her in the last seven years?

A I have seen her several times. I mean at least once, twice every couple of months, you know, I have seen her in different, you know, locations and various places.

Q Have you seen her each year of the last seven years?

A Yes.

Q More than once?

A Possibly.

Q Have you talked to her on each of these occasions?

A Yes, I have.

Q When did you last talke to Susan Weyl?

MR. LAVIN: I object to this, your Honor.

THE COURT: Overruled.

When was the last date you talked to her?

THE WITNESS: I saw her the weekend before Christmas on a Saturday in Bloomingdales. I bumped into her.

Q A week ago this last Saturday?

A Yes, right before Christmas.

Q Did you have a conversation with her then?

A Yes, she stopped me and talked to me and asked me how I was, and I looked at her and she really -- I said, "How are you doing, Susan?"

THE COURT: I don't think there is any question yet.

THE WITNESS: I'm sorry. I didn't know.

Q What was her physical condition?

MR. LAVIN: Objection, your Honor.

THE COURT: Sustained.

Q What was her appearance?

MR. LAVIN: Objection.

THE COURT: Sustained.

A She looked very --

MR. LAVIN: Objection.

THE COURT: Just a minute, please.

THE WITNESS: Oh, I'm sorry.

Q Did you say where you saw Susan Weyl a week ago Saturday?

A In Bloomingdale's.

Q When prior to that did you see Susan Weyl?

A At a party in the -- given by somebody from the garment center.

Q Where was that?

A The party?

Q Yes.

A On Sutton Place.

Q When, approximately when was that?

A I'm not sure. About five, six months ago. I'm not sure, to be exact.

Q Did you talk to her on that occasion?

A I certainly did.

Q Did you discuss with her on that occasion her use of drugs?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q Was there anything unusual about her physical condition --

MR. LAVIN: Objection.

THE COURT: Sustained.

Q Did you see Susan Weyl in 1971?

A Yes.

Q How many times?

A On several occasions.

Q Could you speak a little louder?

A On several occasions.

Q Do you recall where you saw her?

A Yes, in discotheques, in cafes, coffee shops, parties.

Q Approximately how many times in 1971 did you see her?

A Several. I mean, you know, more than a handful of times I saw her.

Q More than --

A More than 10.

Q Did she tell you where she lived in 1971?

A Yes. She was living downtown on Ninth Street.

Q Did she give you her phone number?

A Yes.

Q Did she tell you with whom she was living on Ninth Street in 1971?

A Yes, she did.

Q Who did she tell you she was living with?

A A boy named Barry.

Q Did you ever see anybody referred to by Miss Weyl as Barry in 1971?

A Did I ever see her --

Q Yes, did you ever see Barry?

A Yes, when I saw her in the Hippopotamus, which is a discotheque, she was with this gentleman or boy named Barry, and she introduced me to him, but I don't know him. You know, she just told me she was living with him and he was her boyfriend.

Q Did she tell you anything else about her relationship with Barry?

MR. LAVIN: Objection.

THE COURT: Sustained as to form.

Q What else did she tell you about Barry in 1971?

MR. LAVIN: Objection as to form.

THE COURT: Overruled.

Q You may answer the question.

A What else did she tell me?

Q Yes.

A That she was living with him and it was, as Susan called it, he was her old man and she was in love, and she was just, you know, with him all the time, doing whatever her

thing was, as Susan would say, you know.

Q Do you know whether or not Susan Weyl used drugs in 1971?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q Do you know whether or not she used barbiturates in 1971?

MR. LAVIN: Objection.

THE COURT: Same ruling.

Q Did you and Miss Weyl have mutual friends and acquaintances?

A Yes.

Q How many, if you can approximate?

A 10, 20, you know. A lot of people, you know. Ten where I could say close friends, and then the rest, you know, just people we know through each other and through, you know, various other people.

Q Have you discussed Susan Weyl's truth and veracity with your friends and acquaintances, your mutual friends and acquaintances?

MR. LAVIN: Objection.

THE COURT: Sustained as to form.

Q Do you know Susan Weyl's reputation for truth and veracity?

MR. LAVIN: Objection.

THE COURT: Overruled.

A Yes, through discussing with friends and --

THE COURT: Just a minute. Don't volunteer.

Q What is Susan Weyl's reputation for truth and veracity?

A As far as truth, she is not a truth-teller. She is a liar in my eyes, and from my own knowledge plus.

THE COURT: Strike out the statement. The jury will disregard it.

You may start your answer again. Never mind your eyes.

Q What is her reputation for truth and veracity among the people that know her?

A She's a liar, she's a sneak.

Q That's all.

A Sorry.

MR. DUKE: Thank you.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. LAVIN:

Q Where do you know Miss Susan Weyl from, Miss Luloff?

A Where did I first meet her?

Q Yes.

A I first met her in Miami, through friends I grew up with.

Q You said you had seen her in 1971 how often?

A Several times.

Q Several times?

A Yes.

Q Where?

A In various discotheques, luncheon, coffee shops or parties, or just casually, you know. Could be on the street.

Q In 1972?

A I had seen her -- I have seen her practically since I know the girl every year I have seen her every so often.

Q You had discussions with your friends about her truth and veracity; is that right?

A Yes, her name comes up.

Q Let me show you -- No, you didn't answer my question. You had discussion with her friends about her truth and veracity; is that right?

A Yes.

Q Let me show you Picture 51 of Government Exhibit 7. Do you know any of the people in that picture?

A Yes.

Q Would you tell us who you know in that picture, please?

A This gentleman here.

THE COURT: Who?

THE WITNESS: This gentleman here.

Q What is his name?

A Bruce Gordon. And him, Vinnie.

Q Vinnie who?

A Pacelli.

Q Do you see Mr. Pacelli in the courtroom?

A Yes, I do.

Q Would you point him out for the Court and jury, please?

A Right here.

Q Anybody else you know in that picture?

A Nobody that I can be sure of.

Q Would you take a look at it,please?

A Nobody that I can be sure of.

Q Would you take another look at it, please? A really close look. There is a light over there.

A I'm sorry, sir.

MR. LAVIN: Your Honor, may the record reflect that Picture 51 is one of the wedding pictures and that the individual second from the left is Barry Lipsky.

THE COURT: All right.

Q How long have you known Mr. Pacelli?

A Couple of years.

MR. LAVIN: I have no further questions.

MR. DUKE: Your Honor, before the witness is excused, may I hand up a paper?

THE COURT: This will be marked Court's Exhibit 46.

(Court's Exhibit 46 marked.)

THE COURT: The objection is sustained.

You may step down.

MR. DUKE: Your Honor, may I ask one question?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. DUKE:

Q How many times did you see this person that Miss Weyl described to you as Barry in 1971?

A About six times, I had seen her with him, but, you know, never really met him, you know, where someone introduced me to him. I had seen him, and, you know, he was to me a face.

THE COURT: Did you ever have any disputes with this girl?

THE WITNESS: No, your Honor.

THE COURT: Did you ever tell her you thought she was a liar?

THE WITNESS: Yes.

THE COURT: You told her that?

THE WITNESS: Yes.

THE COURT: Step down.

(Witness excused.)

J A M E S V. G A N N O N, called as a witness by the defendant Pacelli, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. DUKE:

Q Mr. Gannon, what is your occupation?

A United States probation officer.

Q How long have you been employed as a probation officer?

A Six and a half years.

Q Calling your attention to the fall of 1971, did you have occasion to be assigned the probation supervision of one Barry Lipsky?

A Yes, I did.

Q Do you recall the date that that assignment was made, the approximate date?

A When I first saw Barry Lipsky?

Q Yes.

A On November 10, 1971.

Q Prior to November 10, did you have any conversations with Mr. Lipsky?

A One telephone conversation on November 3rd.

I'm sorry, that date is November 4, 1971.

Q He was on probation in Florida before he was assigned to you; is that correct?

A That's correct.

Q The probation that you were supervising was a probation for a conviction involving a securities case in Florida?

A That's correct.

Q Did you on November 3 ask Mr. Lipsky where he was living?

A The November 3rd conversation I asked him to come in for an office appointment at my office on November 10. I don't believe I discussed his address at that time.

Q Did you interview him on November 10?

A Yes, I did.

Q Did you ask him where he lived?

A Yes, I did.

Q What did he say?

A He was residing on East Ninth Street in New York City, 55 East Ninth Street, Apartment 5-P.

Q Did he tell you with whom he was living?

A He was living with a girl named Susan Wylie.

Q Susan Weyl?

A Weyl.

Q Did he tell you what his relationship was with this girl?

A She was his girl friend.

Q Did you subsequent -- did he tell you what he was doing for a living?

A He was working as a salesman for a plastic hanger manufacturer.

Q Did you attempt to verify the information that he gave you concerning where and with whom he was living?

A No, I did not.

Q Did he give you a phone number?

A No, he did not.

Q Did you ever make any phone calls to attempt to verify where he was living?

A No, I did not.

Q Did you ever have a conversation with anybody that purported to be his girl friend during that period of time?

A No.

Q Did you ever visit 55 East Ninth Street?

A No.

Q Is Mr. Lipsky still under probation?

THE COURT: I don't see what that's got to do with this case.

MR. DUKE: May I write your Honor a note about it?

THE COURT: No. I will let you ask the question. Is he still under probation?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

Q Have there been any proceedings to your knowledge to revoke his probation?

MR. LAVIN: Objection.

THE COURT: Sustained.

MR. DUKE: I have no further questions.

THE COURT: Any cross?

MR. LAVIN: I have no cross.

THE COURT: You may step down.

(Witness excused.)

MR. DUKE: Your Honor, the only other thing I have at the moment is some testimony I would like to offer.

THE COURT: You just proceed. We don't proceed by colloquy. We proceed by questions and answers in the proper form.

MR. DUKE: May I have this marked.

(Defendant's Exhibit U marked for identification.)

MR. DUKE: I offer pages 81 through 91 of Defendant's Exhibit U for identification.

MR. LAVIN: I would object to that, your Honor.

THE COURT: Pass them up here.

Objection sustained.

MR. DUKE: May I have this marked.

(Defendant's Exhibit V marked for identification.)

MR. DUKE: Your Honor, I offer the testimony of portions of Defendant's Exhibit V for identification, beginning in the middle of page 106 and ending at the top of page 118.

MR. LAVIN: Your Honor, I will object to that.

MR. DUKE: May I inquire, your Honor, if the authenticity of these exhibits is in dispute?

THE COURT: No. You are not making any point about genuineness?

MR. LAVIN: No, your Honor.

THE COURT: Objection sustained.

Court's Exhibit 47 has been received.

(Court's Exhibit 47 marked.)

THE COURT: The comment as to the first is unacceptable for the reasons already indicated on the record. I will show the balance of Court's Exhibit 47 to the Government.

(Paper handed to Mr. Lavin.)

MR. DUKE: Your Honor, may I correct the numbers on this? I got it mixed up.

THE COURT: Let me see Exhibit U again, please.

(Document handed to the Court.)

THE COURT: Up to what line on 91 are you directing my attention?

MR. DUKE: I'm sorry, your Honor.

THE COURT: Do you want to modify the offer?

MR. DUKE: Yes.

THE COURT: All right. Now what are you offering?

MR. DUKE: Page 83.

THE COURT: Beginning of page 83?

MR. DUKE: Yes.

THE COURT: Line what?

MR. DUKE: The first line, 7 --

THE COURT: Until where?

MR. DUKE: Line 7 on 83 to line 24 on page 90.

THE COURT: In other words, you don't want to read the identification on 81 or 82; is that it? How will you point out who the witness is?

MR. DUKE: Yes, I want that.

THE COURT: In other words, you have to start at 81; is that right?

MR. DUKE: Yes.

THE COURT: All right. I will receive the evidence starting on line 8 of page 81 through line 24 on page 90, the complete offer made by the defendant Pacelli, from which you will of course eliminate the material that represents

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colloquy or something that was eliminated at the time.

Do you follow what I am saying?

MR. DUKE: Yes, your Honor.

THE COURT: All right, go ahead. Read it to the jury.

That is made on the second half of your representation in Court's Exhibit 47.

MR. DUKE: "Joseph Nunziata, called as a witness by the Government, being first duly sworn, testified as follows:

"Direct examination by Mr. Feffer:

"Q. Officer, by whom are you employed?

"A. By the New York City Police Department.

"Q. How long have you worked for the New York City Police Department?

"A. Approximately 15 years.

"Q. What have your general duties been with the New York City Police Department?

"A. Working on drug trafficking and the arrest and apprehension of middle or upper echelon narcotics dealers.

"Q. Directing your attention, Officer, to September 28, 1971, were you on duty at that time?

"A. Yes, I was.

"Q. What was your assignment on that day?

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"A. Investigation of the defendant Louis Valentine.

"Q. Do you see Louis Valentine in this court?

"A. Yes, I do.

"Q. Can you identify him, please?

"A. He is seated at the table with the brown leather coat and blue shirt.

"Q. At what time did you establish surveillance on the 28th of September?

"A. Approximately 4:00 p.m.

"Q. Can you tell the Court and jury what happened after that point?

"A. After that point at approximately 4:30 p.m. that day a Buick had arrived on the scene of the Henry Hudson Hotel which is located at 57th Street between Eighth and Ninth Avenue.

"Q. You may have misunderstood. The date I asked about was September 28, 1971.

"A. Yes. At 7:45 that date, the defendant Valentine -- I observed him exit from the hotel and opposite the hotel enter a 1969 blue Pontiac Grand Prix with Plate No. POA952, I believe, New Jersey.

"Q. Did you subsequently learn whose car that was?

"A. Yes.

"Q. Whose car was that?

"A.. It belonged to one Alberto Gonzales. I believe it was a New York address in New Jersey somewheres.

"Q. What happened then?

"A. From that point a surveillance, a mobile surveillance, was established on the defendant Valentine. My further observation was that of seeing the defendant Valentine enter the blue Pontiac with a key and drive the car from that point to 61st Street and Third Avenue and park on 61st Street at approximately 20 feet east of Third. I first observed the defendant exit from the automobile at 61st Street and Third, lock the car with a key, and proceed on foot to 60th Street and Third Avenue to a cafe on that corner called Yellowfingers.

"Q. Did you see Mr. Valentine enter the Yellowfingers Cafe?

"A. Yes, I did.

"Q. Can you tell us what took place from that point on?

"A. At that point the defendant Valentine met with a male, unknown to me, and a conversation ensued between the defendant and this male, and briefly during that conversation the defendant Valentine handed an object to this unknown male; this male that was unknown to myself, and immediately thereafter the unknown male left the Yellowfingers Cafe, proceeded on foot to the vehicle, the blue Pontiac that the defendant

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had parked on 61st Street off Third Avenue. I further observed the male enter the vehicle with a key and from that point drive the vehicle.

"Q. Can you describe to the Court and jury the manner in which the defendant drove that car?

"A. This was the male, the unknown male.

"Q. I'm sorry. I meant the unknown male. Excuse me.

"A. From that point he pulled out from the parking space where Valentine parked the car earlier and proceeded north from 61st Street and Third Avenue up Third Avenue. At this point this male drove at extremely low speed in the beginning to the right-hand side of the street. He allowed traffic to go by him on a couple of different occasions, and the car went into the traffic, pulled over to the left and right as if he had been double-parked, stopped, started up again driving at varying speeds, abnormally, I would say.

"From that point this male proceeded to East 81st Street and Third Avenue. This time he made a left-hand turn from Third Avenue to East 81st Street, into East 81st Street to Lexington Avenue, Lexington Avenue he proceeded left again going southward. He came to 80th Street which was a block north of where he made the former left-hand turn. He made another left turn as if -- not as if -- what he was doing was

circling the block. One time he circled it completely, from the original left-hand turn. The next time he came around the block again driving in the same manner. He came to 80th Street and Lexington and Third and closer to Lexington Avenue he parked the vehicle on a hydrant, I believe, I think around No. 150 East 80th Street.

"At this point I observed this male come out of the vehicle and come into my direction. I had pulled up and parked closer to Third Avenue.

"Q. Can you tell the Court and jury what the unknown male was wearing at that time?

"A. Yes, he had on, I believe, a dark bell-bottomed trousers and leather Eisenhower-type jacket which was almost hip length with approximately eight, nine buttons on the jacket.

"Q. Were these buttons open or closed?

"A. They were open at the time as he came towards me, walking. I noticed that his walk was of the swaggering type motion, carefree-type walk.

"He continued towards me and I changed positions at varying times to further observe him come to the corner of Third Avenue and 80th Street, walking yet, and proceed north on Third Avenue.

"About midway on Third Avenue between East 80th

Street and East 81st Street, he entered the premises 1420 Third Avenue. Approximately 20 minutes later I observed this male exit from 1420 Third Avenue, but this time his jacket was completely buttoned. All the buttons that were unbottoned prior to this had been buttoned tight and he was walking noticeably different then. When he came out of the building his arms were very close to his body and he walked at a little slower pace.

"Q. Where was Detective D'Ambrosio during this time? Do you know where he was?

"A. We spoke for a brief period of time --

"The Court: How? By what means?

"The Witness: We spoke face to face, your Honor.

"The Court: Where was that?

"The Witness: In the vicinity of 80th Street and Third Avenue, on the corner.

"The Court: All right.

"The Witness: We change our positions. We had formerly set up different surveillance positions. This observation now from that point was that this male walking now south on Third Avenue proceeded to 80th Street on foot, turned into 80th Street, back toward the direction of where he had parked the blue Pontiac. At this point all I observed now was the male walking back in that direction.

"Q. Do you know at this point where Officer D'Ambrosio was stationed?

"A. No, I was up toward the blue Pontiac.

"Q. What was your next observation?

"A. My next observation was that of the male in the vehicle alongside of my vehicle which had been parked on 80th Street close to Third Avenue. I observed the male not quite alongside of me, but a little further forward of me which my vehicle was parked at the time. From this point the male driving the Pontiac drove to Second Avenue and proceeded south on Second Avenue, again driving in the same manner in which he had driven north on Third Avenue earlier in the observation, in which he pulled over to the right-hand side a couple of times, the left-hand side a couple of times, as if he had been double-parking, drove at varying speeds, had traffic catch up to him, and then pass him, and then he would catch up to traffic again, and so on up to 61st Street and Second Avenue.

"At that point he parked on the northwest corner of 61st Street and Second Avenue, in front of a funeral home at that location. I first observed the male exit from the vehicle, lock the vehicle with a key, check the windows on the top of the driver's side, check the door, walk around the rear of the vehicle, check the trunk, check the door on the non-driver

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side of the vehicle. He walked away from the vehicle about 10, 15 feet, came back and rechecked the doors and windows again and the trunk.

"At this point he walked towards me.

"Q. Officer, at this point did you notice whether the unknown male's jacket was still buttoned?

"A. No, at this point his jacket was open as it had been on my initial observation of the male. He was now walking in the same manner in which I initially observed him, in his swaggering motion, carefree-type walk.

"At that point I observed him further walk south on Second Avenue up to 60th Street and then proceed west on 60th Street and walk in the general vicinity toward the general vicinity of Yellowfingers Cafe. At this point he walked past the side door entrance to the Yellowfingers, approximately two or three feet past the door on the curb side of the street -- of the sidewarlk, rather, excuse me -- on the same side of the street as the Yellowfingers Cafe.

"On passing that door, I further observed that he darted to his left. He moved in a very fast motion towards this door and the side door entrance to the Yellowfingers Cafe, and he disappeared from my sight at this point.

"Q. What was the next thing you observed?

"A. The next observation was that of the defendant

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Valentine exiting from the same door in which this male had previously entered. This is about ten minutes later.

"Q. Is this the Yellowfingers Cafe?

"A. Yes. At this point I observed the defendant Valentine walk east on 60th Street out from the Yellowfingers Cafe and proceed in the general direction of where the male had parked the Pontiac on 61st Street and Second Avenue. I further observed him enter the blue Pontiac. My next observation was that of the defendant Valentine driving the vehicle, the blue Pontiac, north on Third Avenue. At this point the defendant Valentine, driving the vehicle, was driving in a similar manner as that of the male that had driven the car earlier that evening. That in which he was driving on the right-hand side of the street, then would drive to the center of the roadway at Third Avenue, have traffic catch up to him, and then have it proceed beyond his position in the street."

MR. DUKE: Defendant Pacelli rests.

THE COURT: Defendant Pacelli rests.

Defendant DeFranco?

MR. PELUSO: Defendant DeFranco rests.

THE COURT: Defendant Barrett?

MR. MITCHELL: Defendant Barrett rests, your Honor.

THE COURT: Is there any rebuttal by the Government?

MR. LAVIN: Yes, your Honor. I was wondering, it will be very short. Could we do it in the morning?

THE COURT: Go ahead.

MR. LAVIN: Could we do it in the morning? One of the witnesses is not here.

THE COURT: What do you call short?

MR. LAVIN: Five minutes.

THE COURT: All right.

Ladies and gentlemen of the jury, it is now 20 minutes past five, so we will go over until tomorrow morning at ten o'clock to hear the balance of the proof in this case.

Again, please let me caution you to wait until the case has been entirely submitted to you and you have heard the closing arguments of the lawyers and the charge of the Court before you attempt to sort out in your mind and ascertain what you believe to be the facts in the case.

Don't discuss the case among yourselves. Don't mingle in any place where anybody could inadvertently be talking about this case or any aspect of the case. Keep a clear undiluted span of attention to what the evidence is in the case, and pay no attention to anybody's comments or anything you could possibly be exposed to which would interfere with the fair and impartial consideration of the evidence alone in this case.

Thank you for staying a little later tonight. I will see you all in the morning.

(The jury left the courtroom.)

THE COURT: We will stand in recess now until tomorrow morning at ten o'clock.

The visitors and parties will please give the jurors an opportunity to get off the floor before they leave.

(Adjourned at 5:25 p.m. to Friday, January 4, 1974, at 10:00 a.m.)

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UNITED STATES OF AMERICA

vs. 73 Cr 881

BENJAMIN MALLAH, et al.

New York, January 4, 1974
10:00 a.m.

(Trial resumed.)

(In open court; jury present.)

MR. LAVIN: Agent Waniewski.

M I C H A E L A. W A N I E W S K I , called as a witness by the Government, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LAVIN:

Q You are a special agent of the Drug Enforcement Administration, are you not, Agent Waniewski?

A Yes, I am.

Q I direct your attention to August 17, 1973. Were you at 420 East 66th Street?

A Yes, I was.

Q Did you participate in the arrest of Benjamin Mallah?

A Yes, I did.

Q Did you seize anything from that apartment?

A A quantity of money was seized from the apartment at the time of the arrest of Mr. Mallah.

Q Did you personally seize that money?

A I was given -- I was in charge of checking all the money that was seized.

Q Did you count it?

A Yes, I did.

Q How much money was there?

A There was approximately $8,540 that was seized separate from the person of Mr. Mallah and on Mr. Mallah there was probably another $6 or so. It came down to about $8,550.

Q Did you count that money in front of Mr. Mallah?

A It was counted twice in front of Mr. Mallah and Mr. Mallah counted it once.

Q How did he come to count it?

A We were at the -- we were processing Mr. Mallah at our headquarters at 57th Street, and I said to Mr. Mallah, I said, "There's this amount of money is being seized from you, and it is approximately --" I gave the count which was $8,550, in that vicinity, and he said, "Okay, I trust you." And I said, "No, you don't," I said, "you count the money." He proceeded to count it and he said "I agree with your tally". And the money was put in a lock-seal envelope and was given

to Agent Samuel.

Q Were you also present on August 17, 1973 when Mr. Mallah was being interviewed in the U.S. Attorney's office?

A Yes, I was.

Q Do you recall Mr. Mallah at that time stating at that interview that he never used the name David Barton?

A That's correct.

Q Do you also recall Mr. Mallah saying he never heard he was indicted until he was arrested?

A That's correct.

MR. LAVIN: I have no further questions.

CROSS-EXAMINATION

BY MR. LaROSSA:

Q Sergeant Waniewski -- am I pronouncing it right?

A That's correct.

Q Were you the one,Mr. Waniewski, who seized the money in the apartment?

A There were various people in the apartment at the time who were collecting money and it was put in a central place which at this time I recall was the bed, and after the completed search was done, I collected the money at that time.

Q So in other words, you took the money that was given to you from other people, other agents?

A That's correct.

Q You didn't pick all the money up yourself?

A No, I did not.

Q Tell me, Mr. Waniewski, did you get a receipt from Mr. Mallah on August 17 for that money?

A A receipt from Mr. Mallah?

Q Did you have him sign a receipt or did you sign a receipt to him?

A No, there was no receipt that was signed. Mr. Mallah counted the money in front of me. It was put in a lock-seal envelope, witnessed by myself and Agent Makowski and given to Agent Samuel.

Q Did you pick up the information -- when I say information, I am referring to the papers that had the name David Barton on them.

A I was -- No, I did not pick up those papers.

Q Did you know about them in the apartment that evening?

A Yes.

Q Had you seen them --

A Yes.

Q -- in the apartment that evening?

A Yes.

Q Did you see them in front of Mr. Mallah?

A I don't recall.

Q Was Mr. Mallah present when you saw them?

A Yes. It may have been in another room, though.

Q Was there a discussion about the name David Barton in front of Mr. Mallah that evening?

A Not to my recollection.

Q Did you ask Mr. Mallah about David Barton that evening?

A I believe he was asked about that at 57th Street.

Q Did you show him the papers on 57th Street?

A I didn't show him any papers at 57th Street.

Q When did you count the money for the first time?

A The first time the money was counted was at 57th Street.

MR. LaROSSA: I have no further cross.

THE COURT: Any cross-examination by any defendant?

No further cross-examination.

No redirect?

REDIRECT EXAMINATION

BY MR. LAVIN:

Q Did Mr. Mallah at any time ever tell you that he had more money?

MR. LaROSSA: Objection.

THE COURT: Objection is overruled.

A No. The only thing that Mr. Mallah said to me was

that when we were counting the money, he said "I trust you. That's the money that was there." And I said, "No, you don't, you have to count it."

MR. LaROSSA: I object and move that be stricken. Not responsive.

THE COURT: This just repeats the other.

Is that all?

MR. LAVIN: I have no further questions.

THE COURT: All right. Thank you very much, Agent.

(Witness excused.)

MR. LAVIN: Sergeant De Luca.

F O R T U N A T O D E L U C A , previously sworn, was re-called as a witness by the Government and testified further as follows:

DIRECT EXAMINATION

BY MR. LAVIN:

Q Sergeant De Luca, I direct your attention to July 14, 1971. Were you on duty in the vicinity of Ballantine's Barber Shop on that day?

A Yes, I was.

Q Can you tell us what you observed during that day, if anything?

A Yes. During the day I observed Benjamin Mallah arrive in front of 844 Seventh Avenue, driving a -- I think

it was a yellow Triumph. A short time later, I observed Louis Mileto and Herbert Sperling arrive at the same location.

During the course of about two hours, Louis Mileto had left in a black Cadillac which he used several times, and upon one of the times on which he returned, he entered into a conversation with Benjamin Mallah, a short conversation that lasted about a couple of minutes, and then he drove off.

Q Let me show you Government Exhibit 60 in evidence. I direct your attention to the pictures. You have already indicated that you put dates next to them from your reports, the dates these pictures were taken. These pictures on the first, second and third pages are all 7/16?

A Yes, that's right.

Q On the third picture on page 3, who are those two individuals in conversation there?

A That's Herbert Sperling and Benjamin Mallah.

Q Did you know Mr. Mallah's name at that time?

A No, I didn't.

Q How did you identify him on that day?

A As a male white about six feet, bald --

MR. LaROSSA: I object to this.

THE COURT: Overruled.

A As a male white about six feet, bald, wearing a red checkered shirt, red and white checkered shirt and light

pants.

Q Were you also on duty on July 30, 1971?

A Yes, I was.

Q Can you tell us where you were at that time?

A Yes, I was down in the vicinity of 5 Spring Street which is on Spring and the Bowery.

Q Can you tell us what you observed, if anything, while you were down there?

A Yes. While I was on observation post on Spring and the Bowery, there was a hotel in which I was located. I observed in front of 5 Spring Street an auto which was used by Louis Mileto --

MR. LaROSSA: Objection. Move to strike.

THE COURT: Overruled. Motion denied.

A And it was registered to Cecile Mileto, parked in front of --

MR. LaROSSA: Objection. Move to strike.

THE COURT: Overruled. Motion denied.

A Which was parked in front of 5 Spring Street. That was about seven o'clock when I arrived and began the surveillance.

At around 7:15 I observed Louis Mileto arrive in a Fleetwood, a black Fleetwood which he used, park the car, and enter 5 Spring Street.

Then I believe at around 7:30 I observed on the street in the vicinity of the Bowery and Spring Street a red auto. The license plate I think was 48S811, which during the course of this surveillance I had known to be used by Benjamin Mallah.

MR. LaROSSA: Objection. Move to be stricken.

THE COURT: This is all taken -- no, the motion is denied. The objection is overruled.

A That auto was parked in the vicinity of Spring and the Bowery.

At about 7:30 I observed Benjamin Mallah and Herbert Sperling in conversation in the vicinity of Spring and the Bowery, walking around that area.

I believe it was about 8:30 I observed Mallah and Sperling enter into the premises of 5 Spring Street.

Then at about 8:45 I observed Louis Mileto exit from 5 Spring Street, walk toward me, which would be eastbound on Spring Street to the Bowery, and hail a cab and proceed north inside the cab.

MR. LAVIN: I have no further questions.

CROSS-EXAMINATION

BY MR. LaROSSA:

Q You testified previously here, did you not, Mr. De Luca?

A Yes, I did.

Q I assume that prior to your first testimony you had occasion to speak to Mr. Lavin?

A Prior to my first? Yes, I did.

Q When you first testified here?

A Sure, yes.

Q This week, was it not?

A Yes.

Q Am I correct in assuming that you have had many conversations with Mr. Lavin?

A Yes, I have.

Q And they related to your testimony?

A Yes.

Q Were you asked any questions when you previously came about whether or not you saw Mr. Mallah on Spring Street?

THE COURT: You mean here today?

MR. LaROSSA: No, sir.

THE COURT: You mean in the trial?

MR. LaROSSA: During the trial, yes.

A Not specifically if I had seen him on Spring Street, no.

Q Were you asked this week at this trial what you observed in the Ballantine Barber Shop area?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q Did you testify about what you observed on Spring Street during this trial?

MR. LAVIN: Objection.

THE COURT: Sustained.

Q Were you asked any questions about Spring Street during this trial?

MR. LAVIN: Objection.

THE COURT: Sustained. That's not the way to prove it. If there is any such inquiry that you wish to make.

MR. LaROSSA: May I pass you a note, please?

THE COURT: Court's Exhibit 48.

(Court's Exhibit 48 marked.)

THE COURT: I'm sorry for that. You can't change the rules because you -- You can't change the rules.

Q Were you asked during this trial what you observed when you were on surveillance at the Ballantine Barber Shop area?

A Yes.

Q Did you tell us that you saw Mr. Mallah talk to Mr. Mileto?

MR. LAVIN: Objection.

THE COURT: Sustained as to form.

Q Were you asked during this trial what you observed on July 16, 1971?

A Prior to today?

Q Yes, sir.

A I don't believe so.

Q Were you asked anything about July 16 prior to that during this trial?

A I don't recall. I may have been. This is the third trial in which I --

Q I am talking about this trial.

A Yes; I don't recall.

Q I am talking about this week.

THE COURT: It seems to me that regardless of the last Court's exhibit, that there is only one way to develop along this line and you are not doing it that way, Mr. LaRossa. I can't change the rules for you.

MR. LaROSSA: I am not asking you to, sir.

THE COURT: Then the objection is sustained.

Q Were you asked questions during this trial about what you observed on Broome and Spring Street?

MR. LAVIN: Objection.

THE COURT: I will allow that question.

A I don't believe so.

Q Did you testify during this trial that you observed

Mr. Mallah and Mr. Sperling meet in the vicinity of the Bowery?

A I don't believe so, no.

Q Is this the first time that you have ever testified with respect to these events?

MR. LAVIN: Objection.

THE COURT: Sustained.

MR. LaROSSA: I have no further questions.

THE COURT: Anything further?

MR. LAVIN: No, your Honor.

I have one more witness, a short witness.

THE COURT: Anything from any defendant? No.

You may step down.

(Witness excused.)

M A R K M I K L I T S C H, called as a witness by the Government, was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. LAVIN:

Q How old are you, Mark?

A Fifteen.

Q Tell us your mother's name.

A Cecile Mileto.

Q What was your father's name?

A Louis Mileto.

Q Did you ever meet a Benjamin Mallah?

A Yes.

Q Do you see Mr. Mallah in the courtroom? Will you stand up and just look around?

Just look inside the well here and not in the back.

MR. LaROSSA: I object to that.

THE COURT: He can look anywhere he wants.

A The man with the moustache and the black glasses.

Q What else is he wearing?

A Brown tie and pink shirt and a brown suit jacket.

MR. LAVIN: May the record reflect that the witness has identified Mr. Mallah.

THE COURT: Yes.

Q Did you ever meet Mr. Mallah before?

A Yes.

Q Can you tell us when that was?

A It was -- I met him on a few occasions and I met him in his apartment in '71 at the end of August.

Q Who were you with at that time?

A My father.

Q What was your father's name?

A Louis Mileto.

Q Why did you go to that apartment?

A To get furniture, couch and a chair, and he gave us

some ties.

Q Did your father and Mr. Mallah have a conversation in that apartment?

A Yes.

Q Do you still have that couch?

A Yes.

Q Did you ever see Mr. Mallah on any other occasion?

A Yes.

Q Where?

A At Ballantine's Barber Shop and at Herbie Sperling's house on 5 Spring Street.

Q Tell us about the time in the barber shop. Who was there?

A Herbert Sperling, and Benny Mallah and my father, Louis Mileto.

Q Can you tell us what happened in that barber shop?

A I was getting my hair cut and I overheard the conversation, and something was said like it was -- "It's in the back."

Q Who said that?

A I don't remember.

Q Who was talking?

MR. LaROSSA: Objection. Move to strike.

MR. LAVIN: I will withdraw the question.

Q Can you --

MR. LaROSSA: I move to strike the answer.

THE COURT: I don't think he made an answer, but I strike it if he did.

Q Were there any people talking together in that barber shop?

A Yes.

Q Who?

A Herbert Sperling, Louis Mileto and Benny Mallah.

Q And did you see Mr. Mallah on another occasion?

A Yes.

Q Where was that?

A 5 Spring Street.

Q Who was there at that time?

A Herbert Sperling and Louis Mileto.

Q Was there anyone else there?

A Cecile Mileto and Josephine.

Q Josephine? Who is Josephine?

A Herbert Sperling's wife.

MR. LAVIN: I have no further questions.

CROSS-EXAMINATION

BY MR. LaROSSA:

Q Mark, my name is Mr. LaRossa and I represent Mr. Mallah. How old were you in 1971, Mark?

A Twelve.

Q Did you ever see a picture of Mr. Mallah before you came in here today?

A Not today.

Q When did you see a picture?

A About two weeks ago.

Q Who showed it to you?

A No one. I picked it up off the desk.

Q What desk?

A Mr. Lavin's.

MR. LaROSSA: Do you have that picture with you, please?

MR. LAVIN: There were a lot of pictures.

MR. MITCHELL: Objection, your Honor.

THE COURT: Strike out all the comment. Also the request. That is not the way to do it. The jury will ignore what these lawyers have been saying to each other.

Q Did you show that picture to Mr. Lavin?

A No.

Q Did you talk to Mr. Lavin about that picture?

A No. He came in the office and I was looking through them and he yelled at me.

Q Mark, does your mother know you are here this morning?

A Yes.

Q I assume, Mark, that you love your mother very much?

MR. LAVIN: Objection.

THE COURT: Overruled.

A Yes.

Q And you'd do anything to help her?

A Yes.

That's not why I'm here.

Q I know.

MR. LaROSSA: I have nothing further.

THE COURT: Any further questions by anybody?

Thank you very much, Mark. You are excused.

You may leave.

(Witness excused.)

MR. LaROSSA: May I pass a note to the Court?

THE COURT: Mr. Duke's note requests directly that the jury be instructed that I consider the testimony on rebuttal as against the defendant Mallah.

This all relates to the defendant Mallah.

That note is marked Court's Exhibit 49.

(Court's Exhibit 49 marked.)

THE COURT: Mr. Lavin, look at Court's Exhibit 50.

MR. LAVIN: I have seen it.

THE COURT: You have? Well --

MR. LaROSSA: Here is an additional note, please.

(Court's Exhibit 50 marked.)

THE COURT: In response to Court's Exhibit 50, have you any knowledge as to what the item is?

MR. LAVIN: Not specifically, no. I know generally what it was, but not specifically.

THE COURT: Now, Court's Exhibit 51, can that be accomplished?

MR. LAVIN: Yes.

(Court's Exhibit 51 marked.)

THE COURT: All right. What do you need, a recess for that, or are you able to supply it now?

MR. LAVIN: For the first, I think I need a short recess. For the second, I can --

THE COURT: Talking about Court's Exhibit 51?

MR. LAVIN: I can supply that.

THE COURT: Staple this and give it to Mr. Lavin so he knows what Court's Exhibit 51 is.

Give him Court's Exhibit 50 so he has both of them before him.

(Exhibits handed to Mr. Lavin.)

THE COURT: The jury will observe that all this note-passing is to make sure that we get before you only what is evidence and not what might otherwise result in colloquy

between the lawyers and the Court which would distract your attention from the evidence.

(Pause.)

THE COURT: Have you now supplied Court Exhibit 51? I know that Mr. Nesland handed some papers over.

MR. LAVIN: 51, yes.

MR. NESLAND: Yes, that was 51.

THE COURT: All right.

(Pause.)

MR. LaROSSA: May I have five minutes with this material?

THE COURT: Take your time. I am giving you plenty of time.

(Pause.)

MR. LaROSSA: May I speak to Mr. Lavin for a moment?

THE COURT: Yes.

(Mr. Lavin and Mr. LaRossa confer.)

MR. LaROSSA: May I re-call Sergeant De Luca for a moment, please?

THE COURT: Re-call?

MR. LaROSSA: Yes.

MR. LAVIN: Your Honor, he might have left the building.

THE COURT: He left the building?

MR. LAVIN: He might have.

THE COURT: See if you can get him back. Use the phone in here.

(Pause.)

MR. LAVIN: He will be here in a second.

(Pause.)

F O R T U N A T O D E L U C A , resumed.

CROSS-EXAMINATION (Continued)

BY MR. LaROSSA:

Q Where were you on July 16, Sergeant De Luca, 1971, when you made the observations you told us about?

A During the course of the day?

Q Yes, sir. During the course of the time that you told us you saw Mr. Mallah.

A In the Hotel Wellington, probably.

Q On the sixth floor?

A No, the fourth.

Q Using high-powered binoculars?

A Yes, I believe we did have them on that day.

Q Using a camera with a telephoto lens on it?

A I believe it was a 200 meter lens.

Q Did you know Louis Mileto on that day?

A By name, no, I don't believe so.

Q Had you seen him before?

A I think we had seen him on the 15th when the surveillance was initiated.

Q Did you know Herbert Sperling on the 16th?

A We knew the name Herbert Sperling. We didn't exactly know who it was at that time, I don't believe.

Q Did you know when you saw a person on the street that that was Herbert Sperling?

A I don't believe we knew that. The 16th was the second day of the investigation. I don't know if we knew that at that time. I don't know if we connected the name with the person at that time.

Q Sergeant, you took many pictures that day, didn't you?

A On the 16th?

Q Yes.

A Not many, maybe a dozen.

Q Aren't all these pictures on the 16th day of July, 1971?

A No.

Q Tell us which ones are on the 16th.

A Page 1, page 2, page 3, page 4, and I believe that's all.

Q Tell me how many pictures are on a page, sir.

A Four.

Q And there are four pages of them?

A Well, yes. One, two, three four.

Q So there are 16 pages in this booklet?

A No, 16 pictures.

Q 16 pictures in this booklet that were taken on the 16th day of July 1971?

A I believe so, right.

Q Are there other pictures that are not in this booklet that you took on that day?

A I don't think so. There may be, but I don't think so.

Q You have many pictures in there of Mr. Mileto, don't you, on the 16th?

A Well, I guess -- you know, I --

Q Would you like to see it again?

A Yes, I would.

I think three, three out of 16. That's what there is, I believe.

Q Any of those pictures show Mr. Mileto and Mr. Mallah talking to each other?

A No.

Q Any of those pictures show Mr. Mileto standing next to Mr. Mallah?

A No.

MR. LaROSSA: Thank you, Sergeant. I have no furthur questions.

THE COURT: Is that everything?

Thank you very much.

MR. LaROSSA: That is. Thank you.

THE COURT: Do you need the sergeant again?

MR. LaROSSA: No, sir.

THE COURT: This time you are excused.

(Witness excused.)

THE COURT: Anything else, Mr. Lavin?

MR. LAVIN: I have nothing.

THE COURT: Government rests?

MR. LAVIN: The Government rests.

THE COURT: All right. Just to make matters simple, why don't we just go into the robing room for a moment and we will be back to you in not more than two or three minutes.

(In the robing room; all counsel present.)

THE COURT: I take it all the motions made at the close of the Government's case are renewed and the determinations there made are adhered to subject to anything that may be called to my attention now as to anything new.

Is there anything further?

MR. LaROSSA: No, sir, just that the record be clear that we are asking that this determination be made

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beyond a reasonable doubt.

THE COURT: Yes.

MR. LaROSSA: That is the Taylor decision.

THE COURT: Yes. That is a determination I made at the close of the Government's case, and I adhere to that determination.

Is that everything on the motions?

All right, now, on the summations, I had the list of those summing up. Let me get them canvassed on prospective time.

Mr. Mitchell?

MR. MITCHELL: Less than an hour.

THE COURT: Mr. Duke?

MR. DUKE: About an hour.

THE COURT: Mr. Peluso?

MR. PELUSO: About the same, Judge.

THE COURT: Mrs. Rosner?

MRS. ROSNER: I would say 35 minutes, Judge.

THE COURT: Mr. LaRossa?

MR. LaROSSA: 45 minutes.

THE COURT: I would say those last two estimates are probably much more reasonable than the first three.

MRS. ROSNER: Probably much more accurate, too.

THE COURT: It seems to me that between 30 and 45

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minutes ought to be ample for any party to sum up in this particular case, and while I am not going to hold anybody to minutes, I think that that is about the compass that I will allow.

All right, go ahead. All defendants have rested.

MR. MITCHELL: Judge, could I ask just two things? Is your Honor going to charge that reasonable doubt may arise from the evidence or lack of evidence?

THE COURT: Yes, the usual charge.

MR. MITCHELL: And will your Honor charge that testimony of an accomplice should be scrutinized with greater c are than that of an ordinary witness?

THE COURT: Yes.

MR. MITCHELL: Thank you.

THE COURT: All right. Mr. Lavin, before the defendants' counsel go out, is the Government willing to consider the case solely under the new law, that is, the law from May 1, 1971?

MR. LAVIN: Yes, your Honor.

THE COURT: So that no old-law charge need be given, and the conspiracy will be deemed to have been charged from the date of the new law?

MR. LAVIN: Yes, your HOnor.

MRS. ROSNER. I have one other inquiry, Judge. Are

you going to marshal the evidence? YOu left that matter --

THE COURT: I will have to decide that over the weekend after I listen to the summations.

MRS. ROSNER: I would really like to know that before we sum up.

THE COURT: I am going to listen to the summations. I expect that I certainly will give the matter very careful attention, but I don't see any reason why that is something that I need to discuss with you at this time.

MRS. ROSNER: Will we have an opportunity to submit proposals on the factual marshaling of the evidence if your Honor does decide to do that?

THE COURT: If you get them to me by tonight, yes.

MRS. ROSNER: You said you are not going to decide until after the weekend?

THE COURT: How am I going to decide it if I dont have your factual requests?

MRS. ROSNER: That is very short.

THE COURT: I will work on this thing tomorrow and Sunday. This is notice to you that we will not have a Saturday session.

Let's go.

(In open court; jury present.)

THE COURT: Ladies and gentlemen, we have arrived

at that point now where the lawyers will argue their case to you, in which they will endeavor to tell you what they think the evidence shows. After those summations, that will be followed by the Court's charge where I will set out the legal ground rules for your consideration.

Mr. Mitchell.

MR. MITCHELL: If your Honor pleases, Mr. Lavin, Mr. Nesland, brother and sister members of the bar, Madam Forelady, ladies and gentlemen of the jury:

I believe when I opened up I said to you that my client is Barney Barrett, and I am solely concerned with Barney Barrett, and in reaching your determination, you are to consider the determination on Barney Barrett as to his guilt or innocence separate and apart from that of the other defendants.

In other words, using the idea of a box, or five boxes, one in Barney Barrett, and everything that has been

(Continued on Page 1494.)

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said that the Government contends can be used against Barney Barrett must go into that box. Subject to his Honor's instructing you on the law as to anything else that may affect the contents of that box, that is what you are to determine.

When we come to Barney Barrett, we have, of all these witnesses that have testified, just three witnesses who mentioned Barney Barrett. That is Joseph Conforti, Reginald Williams, and the police officer, Lino.

First, let's take Joseph Conforti. This is a man who the Government contends was immersed in narcotics transactions from early -- or rather late '71 until his arrest in April of 1973.

At that time he didn't mention Barney Barrett. Barney Barrett was not arrested with the other gentlemen.

What else did the Government have in April of 1973? They just had the evidence of the police officer who wants you to believe that he overheard a conversation from the luggage compartment of that car that was parked in front of the Ballantine Barber Shop. That is all they had at that time. Barney Barrett was not arrested.

I say to you, and I will start that way, without taking the evidence of the officer in any great detail, that what the officer says is that he heard Sonny Gold, and Sonny

Gold has been mentioned here, I think, more than anybody else. He heard Sonny Gold say to Barney Barrett, if you believe that's what he heard, something about "See if it" -- the term "It" was used.

If you consider his evidence alone, I am sure that you would have a reasonable doubt as to Barney Barrett's guilt.

Now, Barney Barrett was observed by the officers. No question that he was present on Seventh Avenue. In fact, one of the witnesses, the gentleman who was a ticket broker, said he knew Barney Barrett from the area for many, many years, had seen him around. The waitress from the Stage Delicatessen had seen him. The officers have taken pictures which show Barney Barrett on the avenue, but all they have is pictures of Barney Barrett with somebody else in the picture.

There is no picture of Barney Barrett conversing. There is no picture except for Government Exhibits 9-A and 9-C that has Barney Barrett in it. That's the only one. It is one day out of, we can almost say, an eternity, from sometime in '71 to April of 1973.

The officers observed Barney Barrett carrying a shopping bag. Oh, they are good officers. They followed him.

You know, this trial is only a search for the truth. The district attorney puts forward what he thinks will convict

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a man. We attempt to establish that the man is innocent.

The officer didn't mention anything about going down and following Barney Barrett. I brought it out. I brought it out because my client was outraged at what had happened to him, an innocent citizen of the City of New York, being picked on by police officers with drawn guns. Why? Because he had several packages of Epsom salts for his feet, and a half a dozen oranges for his room in the hotel where the officers tell you he lived for five years. Why? Because the officers heard that he had pains in his head?

MR. LAVIN: Objection, your Honor.

THE COURT: I don't think we have his pains in the record.

MR. MITCHELL: Yes, your Honor.

THE COURT: All right, go ahead. The jury will decide that for itself.

MR. MITCHELL: The officer followed him on another occasion, saw him go uptown to some bar. There is nothing wrong in that. There is nothing wrong in being in the neighborhood of the Stage or the barber shop.

So now we come to the two other witnesses against Barney Barrett, and the question is, are they believable? Now, let's take Joseph Conforti. What does Joseph Conforti say about Barney Barrett? He says that on one occasion in

the Stage, there were a group of individuals, and Barney Barrett is supposed to have said something about, "If you need mix I'll get it for you."

That was contradicted by Mr. Mallah on the witness stand. None of the other people who were present have been called.

Under our system of law, the defendant is presumed innocent. You know, a long time ago before the Magna Carta, if a man were found dead, it was up to the kin to determine who had killed him and who should be punished and what the punishment should be.

But up until the Magna Carta, unless you were a blue-eyed, fair-haired Saxon, the king didn't bother with you if you were killed. The Magna Carta attempted to establish certain rights that an individual would have.

Before the Magna Carta, if a pig were stolen, you came in before the king with 40 witnesses who said it was your pig, and the real owner of the pig could only get 39 witnesses, he lost. It was just a question of how many witnesses, not their weight.

That system has been changed. We have been given laws to help the innocent and to prosecute the guilty, and I am happy to say that, except for possibly Russia, one or two states of ours, today a man gets justice, a woman gets

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justice in the federal court particularly.

Now, all I ask for the defendant Barney Barrett is due consideration.

Going back to Joseph Conforti, I cross-examined him. I asked a lot of questions, I got a lot of answers which may, to some of you and possibly most of you, you may have gathered the import of my questioning. I was trying to show the type of man that Joseph Conforti was.

If you will recall, Mileto was his pal, his friend, in a wedding picture together. And yet when Mileto asked him, as he says to hold the mix, he wanted money, there was a pattern. He got a couple of hundred dollars. Then he said to Mileto when he had the stuff in his house, the mix, and I have used the word "stuff" and I don't mean narcotics, when he had the mix in his house, he said to Mileto, "Come and get it." He wanted money.

Then according to his version, when he was going out to Queens, he threatened to throw it in the sewer. He admitted that. Unless he got money.

You heard that cross-examination by Mr. LaRossa where he admitted calling up somebody by the name of Kaplan and asking Kaplan for money for this unknown. He told us that this man's name was Spada, a fugitive in this case.

I will tell you why he used the name Spada. He had

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to have somebody that nobody could produce.

MR. LAVIN: Objection.

MR. MITCHELL: A fugitive --

THE COURT: Continue.

MR. MITCHELL: A fugitive would be the person least likely to come into court and contradict him. And so we have Conforti saying, "Oh, there was an occasion where Sonny Gold and Barney Barrett came up to an apartment where I was mixing with Spada," knowing that no Spada would be called by either side. He was telling a story that couldn't be verified, just his word.

And then he tells you that Spada told him, and again we can't call Spada and question him about it, he says Spada had some dealing with Barney Barrett.

The Government is going to ask you to believe Joseph Conforti. I am going to ask you to disbelieve Joseph Conforti.

Conforti admitted that at a previous trial he didn't mention the episode of Sonny Gold coming up with anything. This was a later thought that came into his head. That was something that he never told the authorities when he was arrested, although he told you he was cooperating.

What kind of a man is Conforti? You heard him say that he wanted to meet Sperling, he told that to Mileto.

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Finally, if you believe him, he was introduced to Sperling. And then he said he was around Seventh Avenue.

Was he invited there? Was he asked to come there? No, he said, he, in his own mind, had the idea of hanging around so that he could advance himself, advance himself to a point where it is obvious he supplants Mileto. He takes Mileto's place.

What kind of a man is he? You people know the term for the kind of a person who hangs around ready to do anything for anybody. He says he helped Sperling move in 1971. He got him other things. He got a color TV set for the things he did. Then suddenly Conforti becomes a house painter. He paints apartments in Manhattan, doing everything to ingratiate himself and supplant Mileto. And I believe that Mr. LaRossa will go into it in greater detail than I will, you come to this so-called telephone call to Kaplan, something where he decided he could shake down Kaplan, and he admitted that he concealed evidence, that he lied to the Government.

You know, when you contrast him with Reginald Williams, I will say this much for Reginald Williams, Reginald Williams at least admitted that he expected to get something for his testimony, that he demanded something for his testimony, but now Conforti says, "Whatever happens, happens."

And you remember that gesture of his where he

refused to touch certain evidence and said, "I have taken an oath not to touch anything ever connected with narcotics again." And then he picked up the telephone and he calls Kaplan and he is going to conceal a narcotic deal. Do you believe him?

His Honor will charge you -- I believe his Honor will charge you that both Conforti and Williams are accomplices in any crime that is charged here and that their testimony should be scrutinized with greater care than that of another witness.

What else does Conforti tell you? Anything that he tells you, there is nobody to back him up. On no occasion is there a witness. In other words, he says, believe me or don't believe me. And if you have any doubt as to whether he is telling the truth or not, you must give the benefit of the doubt to Mr. Barrett.

Now, what about Reginald Williams? At the age of 27 he has, as they say, a record an arm long. Just an unfortunate man from his early youth, who came in conflict with the law, and he was convicted of crime after crime, graduating up the scale, unfortunately becoming an addict at one point, as he tells you, and then the big crime, robbery with a loaded gun, and dickerings with the state court in an attempt to negotiate a sentence, and he is informed that he is going to get ten years.

He has already received a four-year sentence --

MR. LAVIN: Your Honor, I just have to object to that.

THE COURT: Yes. I think that now you are going outside the pale of the evidence, Mr. Mitchell.

MR. MITCHELL: Your Honor, the defendant stated --

THE COURT: Now, please. I know what the defendant stated.

MR. MITCHELL: I mean the witness.

THE COURT: I know what the witness stated, too, and it will be the jury's recollection. I think you should stick to the evidence.

MR. MITCHELL: Let me state this now. That is anything I say --

THE COURT: The evidence does not prognosticate what the judge in the state court is going to do.

MR. MITCHELL: You heard Mr. Williams say that he was told, whether by his lawyer or by the district attorney, that the best he could hope for would be a ten-year sentence. I don't know what the court would give him.

THE COURT: The jury is instructed once and for all in this case that punishment is no concern of the jury in any aspect of this case, that punishment is the sole and exclusive function of the judge who is in charge of the case. The

defendant Williams is to come up in the state court before some state court judge and there has been no punishment imposed at that time.

Go ahead.

MRS. ROSNER: Your Honor, may we send up a note on that subject?

THE COURT: Wait a minute, Mr. Mitchell. Somebody wants me to correct something, I suppose.

The note goes off on an entirely different foot and had no relationship whatever to what I was saying. This note says that where the Government aids a witness in his sentence; the Government never aids a witness in his sentence. The Government may make representations. The sentence is the exclusive function of the judge.

On the other hand, it is correct that where the Government puts itself in the position of assisting by communicating with the court in open court and properly, its views, those views are entitled to consideration by the sentencing judge, and it may very well be that a witness who expects that kind of support from a Government employee may have a motive to testify.

Does that cover it now, Mr. LaRossa?

MR. LaROSSA: Yes.

THE COURT: Yes?

MR. LaROSSA: Yes, it does.

THE COURT: Does it cover it, Mrs. Rosner?

MRS. ROSNER: Thank you, your Honor.

THE COURT: I'm sorry to interrupt you. Go ahead.

MR. MITCHELL: Coming back to Reginald Williams, he, sometime in July or August, communicated with the Government, and when they came to see him or brought him over, he said, "I will help you if you get the robbery charges dropped."

He wanted an awful lot for what he was going to give them. They said no, and then there were four or five further discussions until it was agreed between Mr. Williams and Mr. Lavin that if Williams would give them the testimony they needed --

(Mr. Lavin rises.)

MR. MITCHELL: Let me finish, please.

-- and testify before the grand jury and at the trial against Barney Barrett they would send a letter to the judge indicating the extent of his cooperation. And that apparently satisfied Reginald Williams. And as his Honor has told you, you have to search your minds to find out whether or not Reginald Williams now concocts a transaction with Barney Barrett.

He testified to one transaction in December of '72, uncorroborated. No witness. His word alone. And I ask you,

ladies and gentlemen, forgetting the type of case this is, would you want somebody like that individual or Conforti to testify against somebody that was near and dear to you?

Is there a doubt in your mind as to the truthfulness of their statements? Because as I say to you, I have said before, without Conforti and without Williams, or possibly without Conforti, there would be no case. You would go out, you would deliberate, and you would acquit Barney Barrett.

The Government needed certain things. Had Joseph Conforti come forward on April 14 and said, "Barney Barrett did this, Barney Barrett did that," it would be more believable.

What is Mr. Lavin going to tell you? That he forgot to remember?

MR. LAVIN: Objection.

THE COURT: I don't think that you ought to discuss what Mr. Lavin is going to tell them unless you think it is in evidence.

Go ahead.

MR. MITCHELL: So that you have just those three witnesses and nobody else.

I was once an assistant district attorney. I once prosecuted men that were charged with crimes. And I recall that I would tell the jury that this is the best type of

witness we can get.

MR. LAVIN: I am going to object to this, your Honor.

THE COURT: The jury is instructed that this case will be decided on the basis of the evidence in this case. I think I will leave it at that.

MR. MITCHELL: I am trying to convince you, ladies and gentlemen, that there is a doubt, a doubt that exists on the evidence or lack of evidence in this case. There are certain things that are not there. As I said before, except for the pictures on one date, why is there no photograph of Barney Barrett? How is it that there is no photograph of Reginald Williams who tells you that he hung around in that neighborhood constantly from the time that he first met Sperling and was given a few dollars, and that he was always coming back, but there isn't a picture of him, there isn't an officer to tell, "Yes, we saw him there."

The Government didn't even know he existed until he contacted them sometime in July or August of 1973.

I think that I have given you the picture in as short a time as I could. At the same time I owe an obligation to my client and I may re-emphasize certain things, but I come back to the same thing. We haven't got the burden of proof. The burden of proving the defendant guilty beyond a reasonable doubt is on the Government. That burden never shifts until

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they have convinced you beyond a reasonable doubt.

You know, what the Government is asking you to do is to convict a man simply because he is in the neighborhood and they have two witnesses who, in my opinion, are unbelievable, and I believe when you have deliberated on it, you will find that both Conforti and Williams are unbelievable in the context of their testimony against the defendant Barrett.

As far as the police officer is concerned, I again reiterate to you that all he says is that Sonny Gold, this Sonny Gold that predominates through this entire trial, asked him to go inside and find out something about it.

And assuming he did that, does that put him into a conspiracy? There is no narcotics associated with the defendant found on him. There is no testimony that he ever received any money. We are not even conceding that he was an errand boy. It is something for you ladies and gentlemen to determine.

Again I say to you that the guilt or innocence of Barney Barrett is separate and apart from that of the other defendants. Consider his case separately. He is charged just with conspiracy and his Honor will give you the law on conspiracy. I won't even touch it. But I say to you that when you have gone over all the evidence, when you have marshaled all the facts, when you have examined all the

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exhibits, you will find that there is a reasonable doubt as to the defendant Barney Barrett and you will bring in a verdict of not guilty.

I thank you.

THE COURT: Mr. Duke.

MR. DUKE: Thank you, [illegible]

Your Honor, Mr. Lavin, Mr. Nesland, all counsel, ladies and gentlemen:

We lawyers have been living with this case a little bit longer than you have, but you have been living with it now for about three weeks. Nonetheless, the law assumes that we may be of some assistance to you in putting some of the evidence into perspective, and relating it to our particular clients.

I know it must be very difficult when you sit here for three weeks to hear 20 or 25 witnesses in a courtroom as cluttered with suitcases and envelopes, various things, it must be very difficult to compartmentalize the evidence against the various defendants.

The evidence against my client, Vincent Pacelli, consists of two witnesses. None of this garbage has anything to do with Vincent Pacelli. You heard three or four agents testify to a very solid case the Government made against some people named Carter and Reiter. The agents actually

purchased some narcotics from one or the other of these men. There was heavy surveillance and everything else. Joseph Conforti was caught with a carload of paraphernalia and mix and various other things.

This has nothing to do with Vincent Pacelli. Of th 20 or 25 witnesses on that stand, only two witnesses testified against Vincent Pacelli: Barry Lipsky and Susan Weyl.

Now, just briefly on the conspiracy charge and then I will get to the thrust of my defense. The defendants here are charged with conspiring among themselves and with other people that are named in the legal papers here, with distributing narcotics, conspiring to distribute narcotics from January 1, 1971 to September 10, 1973. That is a period of about two and three-fourths years. Ladies and gentlemen, there is no evidence whatsoever, no testimony, nothing, about Mr. Vincent Pacelli in 1972 or 1973. The only testimony about Vincent Pacelli comes from Barry Lipsky and Susan Weyl and relates to 1971.

If you believe every word those witnesses testified to, every last word, you couldn't find Vincent Pacelli guilty of the conspiracy that he is charged with.

It almost seems, ladies and gentlemen -- I was sitting here listening to all this evidence about Carter and

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Reiter and various other people, I was asking myself what does this have to do with Vincent Pacelli? It almost seems as if the Government has this ready-made case where they have solid surveillance, purchases of narcotics, and so forth, and if a willing witness comes along that is willing to stick somebody onto that case, the backbone of that case, in some tenuous way, then the whole case comes in.

But I submit that in determining the guilt or innocence of Vincent Pacelli, you only need consider the credibility of Barry Lipsky, Susan Weyl.

There are some substantive charges, incidentally, that the Court will explain to you. If you believe Barry Lipsky and Susan Weyl, it is -- if you believe them beyond a reasonable doubt, it is your duty to convict my client. Since I am quite certain that you do not believe either of those witnesses, I am not going to get into the details or the technicalities of the substantive charges.

How do you determine in your own everyday lives whether something is the truth or not? There are two ways. One, you listen to the story, and you ask yourself, does the story hang together? Does it make sense? Is it consistent with what I know about human beings and how human beings behave? Is it consistent with external events, the laws of nature? Is it consistent with my own experience or is it

internally contradictory? Is it full of holes? If, applying this test, the story is not consistent, it doesn't comport with your own experience, then that is the end of the inquiry. But if it is a consistent, credible, plausible story, then the next question is, what is the source of the story? Is the source a reliable one? Is the source the one that my own experience tells me I can rely on, or do I have some reason to hesitate in accepting a story of that person?

Let's apply both these tests to Lipsky. First test, is it a plausible consistent sensible story? What is the story?

Lipsky swore to you ladies and gentlemen that although he lived back and forth in New York and Florida from about 1967, he moved up here on January 10, 1971, moved in with Benny Fabray, and at some point he met my client, Vincent Pacelli,, in a discotheque.

Lipsky never had anything to do with the narcotics business, Lipsky told you. In April of 1971, Lipsky says Vincent Pacelli said, "Look, I've got some narcotics. Why don't you sit on them for me, stash them for me, go to work for me," and so forth.

Thereafter, according to Lipsky, he began making deliveries for Mr. Pacelli and changing money. Changing small bills into large bills.

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All of this occurred -- he was quite clear about it -- after April, after Easter, 1971. Before that he was living with Benny Fabray.

Does that part of the story make sense? Narcotics is a very secretive, very dangerous business. The penalties are very severe. Does it make sense that a person in the narcotics business would meet somebody in a discotheque and say, "Why don't you go to work for me? Here are my narcotics. You take care of them." Does that make sense? Does it make sense that anybody would turn narcotics over to Lipsky? The merest kind of inquiry would have elicited these facts about Lipsky: He was in April 1971 under indictment for selling stolen securities. He had a serious psychiatric history. I think many people would consider him a nut. And he was a long-time user of narcotics himself. What sane person would turn over their narcotics to Lipsky? The story doesn't make any sense.

Lipsky realizes this, so he says, "Well, the reason that Mr. Pacelli hired me was he said he heard that in that Florida case I was involved in I did the right thing."

I asked Mr. Lipsky what he though Mr. Pacelli was referring to, and he said, "Referring to what I did in the legal proceedings."

What did Lipsky do in the legal proceedings? He

goes before a grand jury and commits perjury and he attempts to frame an innocent man. He swore that the stolen securities were obtained from Paul McGowan. He admitted on the stand that that was a lie, they were obtained from somebody else.

One of the co-defendants in this case subpoenaed him as a witness. One of the co-defendants thought that if Lipsky testified he would exculpate, he would establish or tend to establish that defendant's innocence.

What did Lipsky do? He made himself a deal with the Government, didn't testify, refused to testify, and got probation for his crime.

Nobody, ladies and gentlemen, but an unscrupulous prosecutor would characterize what Lipsky did in Florida as the right thing.

So the story is preposterous, and Lipsky's explanation for the story is preposterous. It didn't happen and it couldn't have happened.

Lipsky could only have been a principal in the narcotics business. He couldn't be a worker. Nobody would hire him. Nobody would hire him for any kind of a job.

He says he was never in the business before Easter of 1971. Is this true or is this another lie? He lived with Benny Fabray since January 1971. He admitted that Benny Fabray, that he told the Government that Benny Fabray

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had been in the narcotics business. What did Lipsky live on from January of '71 until he moved into 1420 Third Avenue in April? What was he doing? He said he wasn't in the narcotics business. Nothing to do with Pacelli before then. What was he doing? Well, Mrs. Keenan, the lady at the bank, establishes what he was doing, I think. She testified unequivocally, without contradiction, that Lipsky was changing bad money into good in 1970 as well as 1971.By his own testimony he says he didn't change any money until the spring or perhaps the summer of '71. That is a lie. The bank lady, the Government's witness, established it was a lie.

MR. LAVIN: Objection to that, your Honor.

THE COURT: The jury will refer back to what it considers in its recollection was the evidence. Counsel's statement for it doesn't make the evidence. It is what the jury believes the witness testified to that counts.

MR. DUKE: Again he says he was not in the narcotics business until April 1971, but he did admit that in 1969 or 1970 he got $25,000 from somebody on the pretext that he was going to Puerto Rico and was going to buy some cocaine and was going to come back and sell it in Miami.

Ladies and gentlemen, does anybody give anybody else $25,000 to buy narcotics with when they don't have a well-deserved reputation as a narcotics dealer? Does that

make sense?

Lipsky also reluctantly admits that while he did have a little partnership going with Marge Jacklyn, she was selling narcotics for him, not for Pacelli, for Lipsky. Lipsky was giving her narcotics and she was selling them and splitting the profits.

Lipsky swore to a grand jury in April 1973 that he delivered some cocaine which he had gotten from his partner in the apartment at Third Avenue. When I confronted Lipsky with that, typical lizard that he is, he slithers around and he says, "Well, that's incorrect. I didn't say that. The stenographer is in error. I didn't say partner, I said apartment."

When Lipsky moved out of 1420 Third Avenue in February 1972, did he give the narcotics to Mr. Pacelli? No, he gave them to Eddie Ramirez, not Vincent Pacelli.

This case, these events occurred, whatever events occurred occurred in 1971. This is 1974. It has been two and a half years in which some corroboration of Lipsky's story could have been obtained if it were true. I submit to you, ladies and gentlemen, that if his story were true there would be a dozen witnesses in here corroborating it, at least a dozen.

Lipsky would have you believe that he delivered

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with my client Vincent Pacelli, he delivered narcotics all over town, Harlem, the Village, the area of the Ballantine Barber Shop, various other areas. These areas were surveilled for a good part of two years. You have heard about the surveillances. Where is Vincent Pacelli?

They conducted surveillances all over town and there is no Vincent Pacelli anywhere.

Lipsky says that Mr. Pacelli was in the apartment on Third Avenue numerous times mixing narcotics. He says that Mr. Pacelli put him into that apartment, told him about it, suggested he rent it. Where is the doorman? Where is the superintendent? Where is the landlord? Where is anything, anybody to put Mr. Pacelli anywhere near that apartment?

The superintendent came in here; he never saw Vincent Pacelli in his life. Yet Lipsky would have you believe, ladies and gentlemen, that Mr. Pacelli was there frequently. If he was there, there would have been evidence to corroborate from disinterested witnesses, there would have been evidence that he was there. The lack of evidence is proof that Lipsky lies. It is again the story falling apart.

What was there here? Lipsky's main corroboration is a wedding picture. He is in the picture, Pacelli is in it, other people are in it. Pacelli can't deny that he

knows Lipsky. He hired him to cater his wedding. That's the way Lipsky likes to corroborate his story. What does that corroborate? Nothing. Nothing at all.

Now, Government Exhibits 8 and 9, Mr. Lipsky comes in here under oath in his anxiety to corroborate himself, he says this Government Exhibit 8, this man looks like Pacelli, and he wants to say that because here are Sperling and Mileto in the same picture. There is no way anybody could say that is Vincent Pacelli. You take a look at it. I think you have already looked at it. The officer that took this picture didn't say that was Vincent Pacelli. Nobody could possibly say that is Vincent Pacelli except Lipsky. Why? Because that is the only corroboration in this case, and it is a lie and you can look at it and tell it's a lie.

This other picture, some people think that looks like Vincent Pacelli. Some people think it doesn't. I don't think it does. You look at it, ladies and gentlemen, and make your own determination. But what is incriminating about that? Is it a crime to stand on Seventh Avenue? Is it a crime to stand up to a bus stop? That's Lipsky's corroboration.

Now, I suggested to you that with all the surveillances and all the money that the Government has, some kind of disinterested witnesses or some kind of evidence would come

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in if there was anything to Lipsky's story. I don't deny, there is no reason to deny, that Lipsky had narcotics at 1420 Third Avenue. That is clear, he did. That is not in dispute. It is not in dispute that he sold narcotics. The dispute is, did Vincent Pacelli have anything to do with it. I suggest to you that all the surveillances and all the investigatory sources would have produced some evidence to corroborate it. Well, there was a surveillance of Mr. Lipsky by police officers, and that is why I bored you yesterday with that transcript that I read to you. There was a surveillance, September 28, 1971. The gist of that testimony that I read to you is this: Two detectives, Nunziata and D'Ambrosio, followed a man named Valentine to Yellowfingers Restaurant. Nunziata saw Valentine go into the Yellowfingers, meet with an unknown male, hand something to the unknwon male, the unknown male leaves, gets into Valentine's car, drives to 1420 Third Avenue, returns, goes back into Yellowfingers and Valentine comes out.

The unknown male was Barry Lipsky. Now, I brought out that testimony. The Government didn't bring it out. But let me read you something from the transcript in this trial. I am asking Mr. Lipsky these questions:

THE COURT: What page?

MR. DUKE: Page 346.

"Q. Did you testify on a prior occasion in court that you and Mr. Pacelli in late September 1971 met a man named Valentine at Yellowfingers?

"A. Did I testify about that?

"Q. Yes.

"A. Yes, I testified about that.

"Q. And that you and Mr. Pacelli had dinner that evening at Yellowfingers?

"A. I believe we were having something to eat. I don't know if it was dinner. We had something to eat there.

"Q.. After you had dinner, did you testify that you thereafter drove to your apartment and got some cocaine in a car and returned the car and came back to Yellowfingers?

"A. Returned the car where, Mr. Duke?

"Q. Well, left it somewhere in the neighborhood of Yellowfingers and then returned the keys to the Yellowfingers?

"A. That is correct.

"Q. And you turned the keys over to somebody?

"A. That is correct.

"Q. Did you testify that Mr. Pacelli was still there when you returned?

"A. That is correct."

Now, ladies and gentlemen, this trial, Mr. Pacelli's

own trial, you didn't hear Mr. Lipsky say anything about Mr. Pacelli and Mr. Valentine and Yellowfingers. You know why? Because now Mr. Lipsky, I suggest to you ladies and gentlemen, Mr. Lipsky now knows that he was under surveillance by these detectives. He now knows that he can't tell that story anymore because he can be refuted by the detectives.

He testified that there was a clear view in and out of the Yellowfingers. You could see who was there, who was not. These detectives didn't see any Vincent Pacelli in there because he was not there, so Lipsky just leaves that out of the story.

MR. LAVIN: Your Honor, I object and ask that whole thing be stricken. It is a gross misrepresentation of the record.

THE COURT: The jury will understand.--

MR. LAVIN: And the facts.

THE COURT: The jury will understand that each lawyer is going to express his theories and his ideas. The jury will be guided by what the evidence is in the record. The speculations and conjectures of the lawyers on each side may be interesting, but the ultimate test of what is in the record is the evidence, and that you will turn to your recollection for.

MR. DUKE: Now, ladies and gentlemen, that is the

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first part of the inquiry. Does the story make any sense? Does it hold up? I submit that if the most unimpeachable source had told you that story you would have to say, "Come on, you're telling a fairy tale." And a fairy tale is what it is.

Now let's look at the second part. Assuming that there was something to the story. As Mrs. Rosner suggested at the outset of the case, evidence is only as good as its source. Sure, other counsel will talk about Mr. Lipsky's character, and prior behavior, but I would just like to briefly refresh your minds about it.

Lipsky came from a privileged background. He was a vice president of a family business. Then something went wrong. He joined a gang of stock thieves and got himself in trouble. But at the same time as he testified he was a stock broker, he was taking people's life savings in, and he was working with other people to do these people out of their savings. All kinds of con games, the crooked dice, fixed sports bets, shylocking, the whole thing.

Now,he gets caught in the stock case and I suggest, as I mentioned, he tries to frame a guy to get out of it. He is still in trouble. That doesn't work.

While he is in trouble, he does this deal in Puerto Rico and beats the guy out of $20,000.

He has dealt with prosecutors before. He got himself out of that jam. He comes up here and he is arrested for murder in March. He begins to cooperate in March 1972. That is what he testified to? What does he say about Vincent Pacelli when he begins cooperating and before it occurs to him that he may spend 99 years in jail?

Page 353, I asked Mr. Lipsky these questions before you ladies and gentlemen:

"Q. You made a sworn statement, a deposition taken by an assistant United States attorney name Scarring on March 3, did you not?

"A. I believe I did, Mr. Duke."

Now at page 355:

"Q. You were asked questions by Mr. Scarring and you gave answers to those questions; is that correct?

"A. That happened, yes."

Now, on page 356:

"Q. With reference to Mr. Pacelli, did you make the following statement at page 51 of your statement of March 3, 1972: 'I met him through his wife who I had met through his girl Margie Jacklyn, and then he got married. He was getting married in St. Patrick's Cathedral and I was living downtown at the time with this friend of mine Benny Fabray, and he said to me he doesn't have a head to conduct

a wedding of the type he wants to throw for her people. We made the wedding, not his wife's people out in Detroit. He, he made the wedding. He said I want to have a real nice wedding and I know you know how to do this type of thing. This was an original come-together. This was the -- this was the original way I began to know him a little bit.'

"Did you make that statement?

"A. Yes. There is an error in the very first part of it where you said that Marge Jacklyn was his girl. That's not --

"Q. What did you say?

"A. Well, if you could read the line over again.

"Q. It says 'through his girl.'

"A. Well, through a girl. It should be 'through a girl.'"

Skipping over:

"Q. Then on page 55 of that same statement, were you asked this question and did you give this answer: 'Well, did you have any criminal activity or any participation with him in any criminal activity other than this marriage?'

"'A. No, I did not.'

"Were you asked that question and did you give that answer?

"A. I believe I did, yes."

He is cooperating with the Government. He has already been arrested for murder. He is cooperating and he swears the same way he swore to you ladies and gentlemen, but exactly the opposite. He swore that he had no criminal activity with Mr. Pacelli, his only connection was the marriage.

Obviously, if Mr. Lipsky were asked, he would say, "Well, that was a lie, this is the truth now." He wasn't asked. He was asked by Mr. Lavin twice, what were these prior perjuries about? And he said, "Well, they just dealt with promises that had been made to me."

Lipsky had ample opportunity to say, "Well, there was another perjury, perjury on March 3." He didn't say that. Why?

I submit to you that when he thinks about when he has lied and when he has told the truth, this statement is in the truth category.

Then Lipsky becomes a professional witness. He testifies in at least three trials, commits perjury in every one. The matter proceeds apace in state court. The federal people get him a TV set and radio and a private room. Bring him to the courthouse for family visits, and they give him absolute immunity to all crimes he committed or says he committed. All he has to do is tell them about them. Now,

they can't give immunity for state crimes. All they can do is help him with the murder,but boy did they help him. And they are still helping him.

And I am not saying that that is wrong, but I am saying that Lipsky's motive for this information, each time -- all he has to do, he's got it all figured out -- each step. First he wants to get the murder reduced to manslaughter. Then he wants a nice sentence. Now he wants parole.

At each step, the United States Government helps him. He knows the state people want him in prison. The United States Government helps him and he knows how to turn the crank.

He tells a few more lies and a few more perjuries. The Government gets him in -- influences or speaks on his behalf with the result that he gets an indeterminate sentence. He is eligible for parole immediately.

The Government doesn't tell them that Lipsky's committed perjury three times. Just tells them he has been cooperating.

But now Lipsky wants on the street. He wants that parole that the state authorities don't want him to have.

So what does he do? I submit what he did in his own mind, ladies and gentlemen, he said, "Well, never mind

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about what I said about Pacelli under oath. The guy that I catered the wedding for. This is what -- this is the story that comes up -- the guy that I catered the wedding for in 1971 was my boss in the narcotics business. Never mind that I -- what I said before under oath." Perjury is nothing new to Lipsky. Frames are nothing new to Lipsky, and he gives them a wedding picture to corroborate it.

Now, in the meantime, how does Lipsky try to beef up his story? How does he try to give it some credence? Well, he's heard a lot about narcotics investigations, in the last 12 months. He's been talking to agents, prosecutors, testifying. He hears that a fellow named Nicky Lugo was arrested back in January 1970. So what does he do? He says, "Pacelli told me before Lugo was arrested that Lugo was going to sell narcotics to an undercover agent."

Now, Lugo did sell narcotics to an undercover agent, Mr. Salamone, who testified to that. Isn't that a wild story? Of course there is absolutely no corroboration of Lipsky. It is Lipsky saying Pacelli said this. There is utterly no connection with Pacelli in that Lugo narcotics transaction. He says, well, Pacelli told me that before.

Well, again, a man would have to be crazy if he were in the narcotics business with Lugo and Lipsky to say "Well, Lugo is going to sell some narcotics to an undercover

agent." You'd have to be crazy not to stop it, not to do something about it. And it happened. He did it. I submit that story is utterly preposterous and absurd. That's the best he can do.

Then Lipsky says he bought some bonds for Mike and Gus Sperling, as indeed he did. No question about that. $50, $75 each. Lipsky says these are Herber Sperling's children. Lipsky says that Vincent Pacelli told me to buy those for Herbert Sperling. That's Lipsky's story. What did he tell the lady at the bank? He says, "I'm buying these for my boss' children."

Was he buying them for his boss, for his boss' children? Did he tell that lady the truth or is he telling the truth on the stand? Or is the truth a third story? Who knows. Maybe he was buying them for Benny Fabray or Eddie Ramirez. We don't know.

But suppose you believe Lipsky? Couldn't that throw his story out of whack? Suppose that Mr. Pacelli had bought two $50 or $75 bonds for Herber Sperling's children. What does that prove? That is totally inconsistent with Lipsky's story. Lipsky tells a story about Vincent Pacelli and Herbert Sperling and some of these other people dealing in 20, 30 thousand dollars a whack. If you are dealing in that kind of money, ladies and gentlemen, do you give a guy

$50 bonds? It is preposterous. Isn't that an awfully paltry gift for a partner that you are in this kind of a big money for? I submit the story is equally absurd.

What Lipsky has done in this case, ladies and gentlemen, is to try to corroborate himself. As information comes in to him, he tries to hook Vincent Pacelli on it in some way, even though it is only his own testimony. He says, well, Vincent Pacelli told me that or told me this. This is a scheme that he's used before. It is a variation of the scheme down in Florida where he took this customer's hard-earned money from the brokerage business and he said, "Okay, we're going to place a bet for you, four or five thousand dollars," and he comes back and says, "Too bad, you bet on the Giants and they lost." It is just a variant of that old trick.

Twenty-two months ago when Mr. Lipsky was cooperating with the Government and had every motive to implicate Mr. Pacelli if Mr. Pacelli had anything to do with him, he swore under oath Mr. Pacelli didn't have anything to do with him. Now things have changed a little bit, and he changes that story. Can you possibly believe that story? What has my client, Vincent Pacelli, done? He hired Lipsky to cater his wedding. That's what he did, plus he took a lady named Cheryl Lugo down to a bail bondsman because her husband was

arrested, just to introduce her to the bail bondsman. He did a friend a favor.

Ladies and gentlemen, if you are going to be convicted of a serious crime because you do a favor for a friend, a favor like that, then nobody in this world is safe. Certainly all the defense counsel ought to be indicted because we have all done that, and if that is sinister, then the moral is it is no longer safe to do anybody a favor at all.

Now, the only corroboration, if you can call it that, is Susan Weyl. She says that Lipsky moved his narcotics into her apartment in October of November of '71.. She said '72 but we will concede it was '71. And she says that Vincent Pacelli was there several times. She testified that the reason for the move was that she needed money.

Well, ladies and gentlemen, did she lie when she said that or did she lie when she said she was wealthy and always had been?

Mr. Lipsky says the reason for the move were two things: Susan Weyl was broke, she needed money, and Mr. Pacelli wanted Lipsky to get the narcotics away from where Lipsky was living. I submit to you both of those stories are refuted by the facts.

I submit to you that the truth of the matter is that Lipsky moved his narcotics to Susan Weyl's apartment

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because he was moving himself to her apartment, and his narcotics went where he went.

So, did Miss Weyl and Lipsky both lie to you or did they tell you the truth when they said that one reason for the move was that Miss Weyl was broke? Did Miss Weyl tell the truth or did she lie to you, ladies and gentlemen, when she said not only that she wasn't on drugs when she was on the stand, but that she hadn't used drugs in a long time? You saw her, she was irrational, she was incoherent, she was in a stupor.

MR. LAVIN: Objection, your Honor.

THE COURT: All right, leave it to the jury to decide what she was.

MR. DUKE: Did she lie or tell the truth to you ladies and gentlemen when she said Mr. Lipsky never lived with her? Well, Mr. Lipsky told the probation officer that he was living with Miss Weyl, his girl friend. Miss Weyl told Miss Luloff that she was living with her boyfriend, Barry, at that address.

Well, Miss Weyl and Lipsky got their stories together a bit, but like most manufactured stories, when you get into a little detail, they fall apart. You find some contradictions.

Did Lipsky ever date Miss Weyl? Ever take her to a discotheque? Lipsky says yes. Weyl says absolutely not.

Never.

Was she Lipsky's girl friend? They both say no, just friends. But you know what they told the probation officer, and Miss Luloff.

Lipsky swore that he gave a key to Weyl's apartment to Mr. Pacelli, and told the doorman that he and Mr. Pacelli were friends of Miss Weyl's and should be permitted to come in and out at will. Where is the doorman? If that had happened, ladies and gentlemen, 24-hour doorman at that apartment, if that happened, if Mr. Pacelli was ever in that apartment, where is the doorman? Where is anybody to back up those stories?

Now, the Government's burden of proof in criminal cases is probably the highest burden in any legal system, and the burden is to prove guilt beyond a reasonable doubt, and I believe the judge will instruct you that a reasonable doubt is anything which would cause you to hesitate before acting, because you do hesitate. One reason why this burden is so high is the terrible infliction on the defendant if convicted. But another reason, ladies and gentlemen, is that agains all the resources and the might of the Government, the defendant is often powerless to prove his innocence, and this is a perfect example. Lipsky won't give a single date when any of these transactions occurred. He has a terrific memory

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but he can't say any transaction occurred on a particular date. There is no way to refute this claim. All you can say is where is the evidence? Where is some corroboration? Where is somebody else?

All the defendant can do and all that anybody can do when faced with a Lipsky is say, "I deny it." And the defendant said that in his plea of not guilty to you.

Could you do any better, ladies and gentlemen, if Lipsky turned on you ? What could you do except say not guilty?

My client is not as fortunate perhaps as some people, because he did hire this creature to cater his wedding, and Lipsky got himself and some of his friends into the wedding picture. He can't say he doesn't know this creep. All he can say is the guy is a liar.

The case is an outrage, ladies and gentlemen. It is a sham. You may wonder what is it doing here if it's such an outrage. Well, I have to tell you, ladies and gentlemen, that the record in this case requires that I make some observations to you that are rather painful to me as a lawyer. Within my duty to my client as an officer of the court I have got to point out some things in this record that you may not have noticed.

Mr. Lipsky didn't cook up this case all by himself.

He had some help. You will recall that on April 11, 1972, Lipsky was in Assistant United States Attorney Feffer's office. There was a phone conversation between Mr. Feffer and Mr. Goodwin who was Lipsky's lawyer and Mr. Lipsky. At that time, Mr. Feffer promised Mr. Lipsky, Mr. Lipsky's lawyer, that he would not be prosecuted for any information that he supplied, anything that came out of his mouth. Mr. Goodwin, the lawyer, referred to that as a verbal contract, immunity.

Given that promise, ladies and gentlemen, there is no possible way that Lipsky could be prosecuted for a federal crime.

MR. LAVIN: Your Honor, I object to that.

THE COURT: Well, as I told the jury before, and with all due aplogies to Mr. Duke, I will tell you what the law is and we will leave it to Mr. Duke to argue the facts to you. I will give you the proper rules of law.

MR. DUKE: After this conversation, Mr. Feffer takes Mr. Lipsky before the grand jury, that very same day, and he has Mr. Lipsky commit perjury. He has Mr. Lipsky say that he acknowledged that everything he says can and will be used against him, his testimony is voluntary, and he may be indicted.

Later on --

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MR. LAVIN: Your Honor, --

MR. DUKE: Later on, ladies and gentlemen, Lipsky even lies to some agents in March 1973. He told these agents, "No promises whatsoever have been made to me."

Then he gets to a trial and the prosecutor is the same guy that made the deal and the same guy that put him in front of the grand jury, Gerald Feffer.

Here's what happened. Page 422. Now I am asking Lipsky about his prior testimony:

"Q. Were you asked, reading from page 369 of 72 Criminal 664, were you asked by Mr. Feffer:

'Q. Mr. Lipsky, have any promises of any type been made to you from any Governmental authority, federal, state, local, with respect to your testimony here in court today?

'A. On this case, sir?

'Q. Yes.

'A. None whatever, sir. Nothing whatsoever has been promised or told me in any way whatsoever at all.'

"Q. On page 370, question again by Mr. Feffer:

'Q. Do you expect to receive any favorable treatment in any way, shape, or form from your testimony here today?

'A. I have no way of knowing that, sir. I know I am indicted, on trial here for doing what is allegedly I have done.'

"Q. Did you give that testimony? Were you asked those questions and did you give those answers?

"A. Yes, I did."

He wasn't on trial. He was never prosecuted. He had a deal two months before that, guaranteed he wouldn't be prosecuted. He gets up in the courtroom with the guy that he made the deal with, and the guy that he made the deal with elicits perjury from him.

That was the only conspiracy proven in this case, ladies and gentlemen, that conspiracy right there, the conspiracy between Mr.Lipsky and Mr. Feffer to obstruct justice and commit perjury. That is irrefutable, and there is no answer to it. It happened. It is proved.

MR. LAVIN: Objection, your Honor. It has been proved by Mr. Duke.

THE COURT: Just a moment.

MR. LAVIN: Nothing else.

THE COURT: Just a moment.

At the risk of some reiteration, you can ignore what you do not find in the evidence directly or by inference, and lawyers' talk or judges' comments don't substitute for

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evidence in the case, and speculations are not a basis on which the jury should decide what the facts are. You will be guided by the evidence.

Go ahead.

MR. DUKE: What else did Mr. Feffer have to do with this case, ladies and gentlemen? Well, when Mr. Lipsky first started cooperating back in March 1972, Mr. Feffer was there. At that time, however, Mr. Lipsky told the truth and said that all he had to do with Mr. Pacelli was to cater his marriage. Feffer presented the testimony to the grand jury. Feffer helped Lipsky in his murder case, got him the TV, radio, visits with his family, and when Mr. Lipsky thought he was going to get 99 years in jail for murder, he writes to Mr. Feffer, and you heard portions of the letter in the testimony. It was about that time that he begins to think about, I submit, about who else he can stick with his own narcotics racket.

The Government said to you at the outset, "We don't ask you to go to lunch with these witnesses," and indeed they don't. But Mr. Feffer takes him to lunch. He has taken Miss Weyl to lunch once or twice. She so testified.

And there is Mr. Conforti. Now, I am not representing Mr. Mallah. He is ably represented. But I can't resist pointing out to you that Mr. Conforti testified that

he began cooperating on April 14, 1973, and he was telling the authorities all he could or all that he thought would help him, but it wasn't until June that he ever mentioned Ben Mallah. And who did he mention Ben Mallah to, ladies and gentlemen? Jerry Feffer. Mr. Conforti said Jerry Feffer. I assume that is the same assistant United States attorney.

With this kind of a background, is it any wonder that Lipsky concocted this story? It didn't take him long to get the message. Committed perjury four or five times. The Government, nobody prosecuted him for it. In fact, every time he committed perjury, it seems he gets more help in his Nassau County case.

Nobody has threatened him with prosecution. He doesn't expect prosecution. And you know, ladies and gentlemen, he is not going to be prosecuted. He knows that he can lie all he wants to, and if he gives an ambitious prosecutor somebody to prosecute, he is going to get some help.

Now, I am not suggesting, ladies and gentlemen, that the attorneys here are at all implicated. I have no reason to think they are. Their job is to present evidence, make objections, make arguments. I am not suggesting in the slightest that these gentlemen had anything to do with the way this case was cooked up. I am not saying that the

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Government is guilty of any misconduct, because, ladies and gentlemen, when this kind of stuff goes on, when you have an ambitious prosecutor combining with a crooked con man like Lipsky, that is not the Government. That is only the Government if you say it is the Government. If you accept it, it is the Government. If you don't, it's a couple of crooks.

Ordinarily, if a defense lawyers suggests Government misconduct, the prosecutor will get up and say, "Ladies and gentlemen, if you think that anything like that happened, don't spend two minutes, forget the law, forget the evidence, acquit the defendant." I don't think you will hear that today.

Occasionally a rotten apple gets in the Government's barrel and this is the result, Lipsky.

The Government is what you make it, ladies and gentlemen. The only way to get that rotten apple out of the barrel, the only way to have justice is for ladies and gentlemen of the jury to make the appropriate decision.

I have no defense for the narcotics business. It is a rotten, filthy business. I feel a grave concern for narcotics trafficking, getting us into this kind of mess, putting these kind of people on the stand, people like Lipsky, to tell these kind of stories, and to earn their freedom from a life of crime, including criminal homicide, including

narcotics.

We shouldn't let Lipsky use and manipulate our courts and our prosecutors the way that's been done. That's what Lipsky has done. His first game when he got in with those stock thieves was to con his customers in the brokerage firm into crooked games, various things that he told you about. Well, he loses that job. He is indicted. Now he's got a bigger game, the stakes are higher, in a way it is more profitable. He can buy his freedom.

At the same time, he can con, he thinks he can con the courts and juries and prosecutors and everybody else and have himself a grand old time while he's doing it. This man has contempt for law, contempt for courts, contempt for juries, contempt for human life. The only thing he cares about is Barry Lipsky. He's turned a privileged background and a gifted intelligence into a life of serving the lowest forms of humanity.

I think, ladies and gentlemen, that the incredibility of Lipsky's story is so patent that you will easily find my client, Vincent Pacelli, not guilty. And when you do, you will incidentally be telling Barry Lipsky his string has run out. He has to find a new game to play, that he is through conning the courts in the United States.

Thank you.

THE COURT: Mr. Peluso.

MR. PELUSO: Judge Pollack, Mr. Lavin, members of the prosecution team, members of the defense table, Madam Forelady, ladies and gentlemen of the jury:

Before I make any comments with regard the the case or the facts, I would like to take this opporunity on behalf of myself and my client to thank each and every one of you for the time you have given in this trial.

We have been here since December 17. We have been here over the holidays. It is not the easiest thing in the world to do, to spend your holidays in a courtroom listening to this type of a case.

The first thing I would like to get out of the way, ladies and gentlemen, is, we are not here to decide whether or not narcotics, heroin, cocaine, or drugs is something nice or something bad. I think we all agree, each and every one of us agree, that narcotics is a heinous crime, it is a heinous drug.

We are here for one reason, to find out whether or not Mr. DeFranco is guilty of the charges that were brought against him.

Mr. DeFranco is charged in this indictment in two counts. His Honor will cover this with you, so I am not going to get involved in that.

At the outset I'd like to state that, what is a trial? It is a search for the truth. It is an effort to administer justice in a courtroom. If we make a mockery of a trial, we may as well forget about democracy, we may as well forget about justice.

When you are searching for the truth, where do you look for the truth? Do you look for the truth from liars? I think if you use common ordinary everyday sense, you can figure this out for yourselves. There is no mystery to this. If you want to drink pure water, where do you go for it? You go to a spring, a clean spring, a well, a clean faucet. You don't go to get a glass of water in a cesspool or in a toilet bowl.

We are looking for the truth in this trial. The Government offers you Barry Lipsky. The Government in its opening said, "Ladies and gentlemen of the jury, we take our witnesses the way we find them. I am not asking you to take Mr. Lipsky to your home." Why aren't they asking you to invite this man to your home? Because they know you'd shut the door and he'd never get past the door. They say we are not asking you to invite this man to your home, but we are asking you to use his testimony to take Mr. DeFranco's liberty. I think that is disgusting.

First of all, this isn't a stew. We're not

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throwing everybody into a pot and cooking. We are not firing a buckshot and say everybody gets hit with pellets. Mr. DeFranco is on trial here. He is entitled to your independent consideration.

We see all sorts of exhibits on the table: suitcases, packages, toupees.

Ladies and gentlemen, this is my one opportunity to speak to you. During the course of this trial I have done very little talking and I think it is obvious why I have done very little talking. Only one man attempts to implicate Mr. DeFranco in this case, Barry Lipsky. No police officers, no photographs, no narcotics, no surveillance, nothing but the words that come from the lips of Barry Lipsky, the words that come from a polluted source.

I'd like to state in commenting on the evidence, it is very possible, ladies and gentlemen, that I may not completely recall all of the testimony or that Mr. Lavin may not completely recall the testimony, that we may say something that is not accurate, and I adhere to what his Honor said: lawyers' talk and judges' comments have nothing to do with the innocence or guilt of Mr. DeFranco. He is either innocent or guilty, based on what came from that stand, the evidence against him.

You analyze the evidence. It boils down to Barry

Glenn Lipsky, B.G.L., Biggest Greatest Liar, Biggest Greatest Liar.

I'd like to point out that when Mr. Lipsky took the stand, the Government asked him some questions and quickly got over the fact that you've got a record; you pleaded -- you testified in Florida, you committed perjury; you testified in the Southern District, you committed perjury; Let's get that aside. Now tell your story.

We can't pass that aside so easily. That is the crux of this case. That is the crux of this case against Mr. DeFranco.

Barry Lipsky went before a grand jury in Miami, Florida, swore to tell the truth, the whole truth, and nothing but the truth, so help me God, and then he told a lie, the whole lie, and nothing but a lie in spite of his plea to God.

Barry Lipsky came to the Sourthern District of New York, swore to tell the truth, the whole truth, and nothing but the truth, so help me God. Second time he calls upon the Deity. Second time Barry Lipsky tells a lie.

Barry Lipsky comes into this courtroom, swore to tell the truth, the whole truth, and nothing but the truth, so help me God. The third time he calls upon the Diety. But this time he tells you he is telling the truth.

Is this oath any different than the other oath?

Exactly the same. That is his answer. But he is telling the truth. This is a chameleon, changes colors, anything, walks around with a paint brush, he is ready to paint anybody's portrait in the picture, provided he could sell that picture and save himself.

The only thing I say, we are lucky that Barry Lipsky didn't decide to put my portrait in that picture or your portrait or someone dear to you.

When did these events happen about which he is testifying? August, September, October, November, 1971. '71. Long time ago. Doesn't give us a specific date. He couldn't say August 1st or August 3rd or the week of August 1st. August, September, October, November. Again, October, November, December. Why does he do this? Because he's been around, he is experienced. He knows if he said this happened the first week of August, I'd be out hunting and looking. Perhaps I could show that my man might have been in the hospital on that day, he might have been in Oshkosh, we may have a defense. He says, no, I am not going to give you a definite date. I am going to say at or about. Very clever. Very clever.

And when does he say this? Not in 1971. In 1973. If he said this about you, what would you do? How do you disprove this man, other than the fact that you come in and

say, just look at him, look at his history, look at his life. This man is a degenerate. This is the test you use, ladies and gentlemen.

If a man came to your house in response to an ad to babysit for your child, and this man came to you and you learned, and he admitted, that on three prior occasions he molested children, would you let him babysit for your child? Should we ask him to babysit for Mr. DeFranco's child?

If he came to you and says, "On three prior occasions I committed perjury," after you force it out. He admits it, and then he proceeded to tell you something about your wife,your husband, your child, would you believe that man? Why should you believe him when he tells you this about Mr. DeFranco? The law is the same for Mr. DeFranco as it is for each and every one of you and as it is for me.

Barry Lipsky is a molester. In this case he has molested the truth, he has murdered the truth. He has contorted the truth so out of shape that it bears absolutely no resemblance to the truth. He makes the truth whatever suits his purpose. Not only has he committed perjury in Miami and New York, he has never been indicted for this. He has never been convicted for this. Here is a man walking around with a license in his pocket to lie. He is a professional liar and he has a license to lie . He is going

to take that stand and tell the truth, knowing he has that license to lie in his pocket? He has called upon the Deity three times, and then just did an about-face and told a lie.

Does it make any difference to him that he calls on the Deity on this occasion?

I think trials and courtrooms are just too holy a place to allow this type of man to come into. We are not dealing with traffic tickets here. If you make a mistake here, you know, there is not going to be a two-dollar fine. We are dealing with a man's precious liberty. Mr. DeFranco was born free. Each of us was born free. He was given freedom by God. Mr. Lipsky wants to take it away. He is asking you to help him rape Mr. DeFranco of his liberty, take him from his family.

After I sit down, ladies and gentlemen, I am not going to have an opportunity to get up again. I am not going to have an opportunity to respond to Mr. Lavin. I am not going to have an opportunity to make any comments once I sit down, and I have to beg each and every one of you to do this for me as you sit there, as you go inside and deliberate, as all of the testimony on this table, as all of the exhibits are brought forth, you just keep saying one thing: Mr. Lavin, what has that got to do with Mr. DeFranco? Mileto, Conforti, I heard names here that I thought we were reading off some

bibliography or encyclopedia. What about Mr. DeFranco? What did he do?

Barry Lipsky said he went up to a club on East 115th Street sometime in August or September or October or November, December, I don't know, I don't remember, but one thing, each and every one of you have the right, when you go into the jury room, to say, "I want to see the record. I want the record read to me. I want the facts. I am not going to listen to what Mr. Lavin says or what Mr. Peluso says or the comments of the Court. I want the facts. Give me the testimony about Mr. DeFranco. Let me see what was said."

"If there is anything other than Lipsky, let me see it." This is your right. Ask for it. We want you to ask for it because we have nothing to hide, ladies and gentlemen.

You know, in a trial we have the scales of justice and under our system every individual is presumed innocent unless and until proven guilty beyond a reasonable doubt, and his Honor is going to so charge you. So when you start off, the scales are this way for Mr. DeFranco, for Mr. Peluso, for Mr. Lavin and for each and every one of you on the jury. The scales are this way and before they get tilted this way, and we can get a conviction, the burden rests with the prosecution to come forward and present evidence. They are

making the charge. As Mr. Duke said, oftentimes you are charged with a crime for which you can't defend yourself, especially this type of a crime. So the law says, "Okay, Mr. Lavin, you are bringing these charges, you prove these charges. Prove them with credible, believable evidence."

Now, the only thing that was put on the opposite side of the scale is Mr. Lipsky, and believe me, that scale didn't budge.

We try when we select a jury to pick people that we believe are intelligent, sophisticated enough to look behind all of the smokescreens that are going to come out in the courtroom. This is the reason why during the jury selection lawyers object to certain jurors, send notes up to the judge. I am confident that the jury that I have selected for Mr. DeFranco is the type of jury that I would want for myself. I made every effort as best I could to pick twelve people that I felt could be intelligent enough, based on the information I had, to look through all the smoke-screens, people that I felt could come into this court and administer justice.

We try to find people that are fair, we try to find people that are just.

I think his Honor is going to tell you, we can't convict people on surmise, conjecture, speculation. We

convict people on proof. Because after this trial is over, ladies and gentlemen, each of you are going to go home and in due time you are going to forget all about this trial. Mr. DeFranco is never going to forget about this trial. This is something that he is going to have to live with. It is not an easy experience to go through one of these things. But one thing that each and every one of you have to do in deliberating the evidence concerning Mr. DeFranco is to be sure, be morally certain, that the prosecution has proven him guilty beyond a reasonable doubt, because if there is any doubt in your mind, ladies and gentlemen, wouldn't it be a funny thing if maybe six months from now when you are home and you are lying on a pillow and you are saying to yourself, "Is it possible that maybe that man was really innocent?" You'd have to live with that the rest of your life. What you do, then, is you are taking Barry Lipsky home with you. You are putting him in bed with you. He is in your conscience. He is living with you because you know that you could never have convicted Mr. DeFranco except for the words that came forth from the polluted source.

I want to explain, ladies and gentlmen, so there is no misunderstanding, Mr. DeFranco has not presented himself in this case on the witness stand, and the fact that he has not taken the witness stand, his Honor will tell us,as a

matter of law cannot be held against him. There can be no inferences drawn from the fact that he has not taken the stand. The law says the people must prove him guilty beyond a reasonable doubt. When he was arrested he came into court and at his arraignment he said "Not guilty." He said, "I am innocent. You say I have done something, okay, prove it."

Look at this indictment, ladies and gentlemen, August, September, October November, December, January -- I forget the months, back in 1971.

I asked Mr. Lipsky whether or not in response to questions put by co-counsel Mrs. Rosner whether he had not stated concerning whether or not he had a photographic mind, whether he had not stated he has got a good memory, he's got a photographic mind when it comes to things like telephone numbers, addresses, license plates.

Now, I asked him, on the two occasions about which you spoke when you got a white Cadillac, you said you were given the keys to a Cadillac and a registration and told to go outside and get that Cadillac. Did you look at the registration? Whose name was on the registration? Was it a New York registration? What was the license plate number?

"I don't remember. I don't remember. I don't remember. I don't remember." This is a photographic mind.

Why doesn't he remember? Because if he had given

us a license plate number, I could go to the Motor Vehicle Bureau and come in and show you who owns that car. He testified a white Cadillac, a white Cadillac, a white Cadillac. When I pressed him, "Are you sure it's a white Cadillac?" "Could have been a gray Cadillac. It was dirty." This is the chameleon changing colors.

I am sure, ladies and gentlemen, that if such a Cadillac existed, the United States attorney with all of its resources, would have had the Motor Vehicle Bureau down here, someone on that stand saying, "Here it is, 1965, 1964 Cadillac, whatever it was, white, in the name of Mr. DeFranco."

Where is it, ladies and gentlemen? Where is it? Can I subpoena the Motor Vehicle Bureau to prove a negative?

"Mr. Lipsky, you have been at this apartment how many times, this building, this club?"

"At least two occasions. At least two. Maybe 20 times."

"Resort to your photographic memory. What is the address?"

"I don't remember."

Why doesn't he remember? Because if he gives me an address maybe I can show that there is not club at that address. Maybe I can bring in the super. Maybe I can bring in the tenants. Maybe I can show that this is a fabrication.

He says a club on East 115th Street. You go look for it, Mr. Peluso. If I go and I find the club on East 115th Street he is going to say that is not the club. Very clever.

"Mr. Lipsky, you were up at the apartment on the first floor. What was the number of that apartment?"

"I don't remember."

"Mr. Lipsky, you knocked at the door of that apartment. Describe the door. Was it a wooden door, a glass door?"

"I don't remember."

"Mr. Lipsky, you were in the apartment. Describe the carpeting."

"I don' t remember,"

"Describe the apartment, the lamps. Fluorescent lamps, bulbs, light switches on the wall, string?"

"I don't remember."

He is not going to remember because he is going to make it impossible for me to show you that he is a liar. That is why he is not going to remember. I wanted him to give me an apartment. I'd be up at that apartment taking pictures. I'd have the occupant of the apartment down here, and I say to you if an apartment did exist, the United States Government with all its resources would have had the registered owner of the building, the occupant, the tenant,

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everybody would have been down here.

MR. LAVIN: Objection.

THE COURT: I will leave it to the jury to decide on the basis of evidence. They will consider all of this argument that is being made if it applies.

MR. PELUSO: As an aside, ladies and gentlemen, Mr. Lipsky testified concerning some apartments where drugs were kept, and the Government went out of its way to bring in locksmiths to show that metal plates were put on the door. All kinds of locks were put on the door. I guess this is because of the value of the drugs. Now when he is talking about Mr. DeFranco, the drugs lost their value. He goes out and gets a white Cadillac, goes to pick up a kilo, leaves it in a car on 96th Street unattended. Not on one occasion, on two occasions.

I realize we are getting close to lunch time, ladies and gentlemen. If I haven't made my point to you now, I think if I spoke for another four hours I wouldn't get the point across.

The only thing I would say, in closing, to each and every one of you, don't be afraid to ask for the testimony. Don't be afraid to ask for the record. If there is any doubt in your mind, ask for the record, and you are going to see that the entire case against Mr. DeFranco comes from a

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polluted source. And what is the case? Two occasions he went to a club, got the keys, went out, got a Cadillac, drove downtown, got some drugs, came back, parked the car, came back to the club, and entered the club and left the keys. That is the whole case against Mr. DeFranco.

By the way, I don't want to forget this. "Mr. Lipsky, do you use cocaine?"

"Yes."

"Do you use alcohol?"

"Yes."

"Have you been under the influence of cocaine and alcohol?"

"Yes."

"Get violent?"

"No, not a violent man."

Not a violent man? That is not true. He says, if I may read from page 549 of the testimony, "Would you say you are not a violent person?

"A. That's true. I have a bad temper, but I only tend to hurt myself; don't hurt anybody else."

He was arrested for murder, pleaded guilty to manslaughter. I wasn't arrested for murder. You weren't arrested for murder. Do you have to be a violent person to be arrested for murder? Is murder a violent act?

I am sure he didn't murder himself. The lie is so obvious, so obvious. Here's a man takes the stand, admits that he is arrested for murder. Admits that through some deal, through some assistance by the U.S. Attorney's office, he was able to plead guilty to manslaughter. Then he tells you, "I am not a violent person."

If I may, at page 500 of the testimony:

"Q. And you have no recollection of Mr. Catino and Mr. DeFranco engaging in a fight with you over this incident?"

Listen to the answer:

"Never. I never knew them well enough to even have social conversation with them, so I never knew them well enough to have a fight with them."

Mr. Lipsky, "I never knew them well enough to have social conversation with them." Just listen to that. Never knew Mr. DeFranco well enough to have social conversation with him. But he wants you to believe that he sold drugs to Mr. DeFranco. That wasn't my testimony. That was Mr. Lipsky's testimony in a moment that he was caught off guard not wanting to admit that there was an altercation at the Hippopotamus. So how does the chameleon move? The chameleon says, "I never knew them well enough to have a social conversation with them." Completely forgetting that he had earlier

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testified he'd been in a club with them, 20 occasions in the building, that he sold drugs to them. These are the things you have to look for when you are dealing with a witness like Lipsky.

Ladies and gentlemen, before I close I want to thank you again. When you go into the jury room, don't allow the window to open up and a hurricane to come in and sweep everybody in the courtroom. I want you to devote 100 percent of your time to the defendant Mr. DeFranco, and then after you have decided all of the evidence against him, and made your decision, then go on to another defendant, and go on to the next defendant. I caution you, please don't go in and give Mr. DeFranco less time than you would want someone to give if you were on trial. And the only way, the only way to stop people like Barry Lipsky from coming into courtrooms and destroying peoples' lives and homes is by coming in and saying, "I don't believe you, Mr. Lipsky. Maybe other people want to give you a license to lie. I don't believe you. You are a liar, you are a murderer, and that is just what you are and I am going to call it as I see it."

Thank you, ladies and gentlemen.

THE COURT: We will take a recess now until 2:15 for lunch.

(The jury left the courtroom.)

THE COURT: Mr. Peluso, it is unfortunate that you, in a moment of exuberance at the tail end of your summation made a characterization which you really should not have made. You know as well as anybody else that an arrest on a charge for murder is not a conviction of the crime of murder, and I think that your comment was distinctly out of order as an officer of this court.

MR. PELUSO: Judge, if it was done, it was done unintentionally on my part, and I would apologize to the Court, but it is my belief, Judge, and I perhaps am at this time not completely aware of what I said, but it was my intention to say that he was arrested for murder, and pleaded guilty to manslaughter.

THE COURT: I think that you were carried away by the flourishes that you were engaging in, and I think it was inadvertent, but it was error.

(Luncheon recess.)

AFTERNOON SESSION

(In open court; jury present.)

THE COURT: Mrs. Rosner.

MRS. ROSNER: May it please the Court, Mr. Prosecutor, fellow defense counsel, Madam Forelady, ladies and gentlemen of the jury:

So much has been said by the lawyers who have preceded me that I don't want to rehash, and I just hope you will, wherever applicable, use for my client the arguments that have been made by other counsel.

I do also want to thank you all for your patience. If, during the course of the trial, I have done anything, acted in any way, that you ladies and gentlemen thought improper or which you didn't like, I hope that you will be generous in spirit and not attribute that to my client, because it is not his doing, it is mine.

If there have been exchanges between myself and the Court or myself and other counsel which have not sat well with you, I hope that you will disregard them. They are not evidence and they are not to influence you.

As Judge Pollack told you many times during the trial, and I am sure he will tell you again, what we as lawyers say are no more than arguments, reasoning, persuasion which we hope you will adopt, and that is counsel for both

sides, Mr. Lavin as wells as defense counsel.

They are not to be considered by you except as they persuade you by the reason and good sense of them. Similarly, if any attitude has been conveyed by the Court, however unintentional, that is not evidence, that doesn't supplant your function as fact finders here.

Before I proceed any further, in this very important business that I have been entrusted with, I would like you ladies and gentlemen to look into your own minds and hearts for just a moment. If there is any one of you, because each and every one of you are important to us, if there is any one of you who has closed your mind, resolved the issues, who is not willing to listen to reason, there is nothing that I can do. But if you will sit with an open mind and listen attentively, I think that I can persuade you from what has transpired from that witness stand, that there is at the very least a reasonable doubt as to the guilt of Alfred Catino.

That brings me to a subject which is perhaps most important of all. On October 26 of this year, just a few months ago, Mr. Catino walked out of his home, a day like any other day. He was totally unsuspecting that something was going to happen which could alter the balance of his entire life. He was arrested. When a man's liberty is

interfered with, when the possibility of changing the course of a person's whole life becomes a reality, the law imposes certain safeguards which protect not only Mr. Catino and the other men on trial here, but which protect everyone of you, ladies and gentlemen, and the members of you family and those near and dear to you.

When a man is charged in a criminal indictment, the Government has the very, very heavy burden of convincing each and every one of you ladies and gentlemen to that well-known phrase, beyond any reasonable doubt.

His Honor will tell you, in his instructions to you, that this means that when you make a decision here, you have to be satisfied to the kind of moral certainty that will let you people rest easily with what you have done for the balance of your own lives, because that kind of assurance, if that does not exist, it is their right and it is your absolute sworn duty to return a verdict of not guilty.

This is what lawyers mean when they say that the defendant is entitled to the benefit of the doubt. It is, I am sure, what you ladies and gentlemen would want for yourselves or anyone near to you who had the misfortune to be accused of crime.

What does this mean in practicality? It means when you go into the jury room to deliberate this case, you don't

say to yourselves, well, I think they are probably guilty. I have a suspicion or a hunch, I've got a feeling. That's just not good enough. You have to be convinced to such an extent that if your very own lives or your own property, if everything near and dear to you hung on it you would make the same decision. That is what we are talking about. And my job, ladies and gentlemen, is to show you upon reason, upon the evidence and the lack of evidence, that that has not been done, and I think I can fairly state to you that I can do that.

There are three areas that we must look at in judging the case as to Mr. Catino. And as Mr. Peluso said, you must be very, very careful to take the evidence in this case and segregate it as it applies to each and every individual on trial.

What have we heard about Mr. Catino in this case? I will take them as it came in, but backwards, for simplicity. The very last thing you ladies and gentlemen heard was that on the day he was arrested, Mr. Catino was in possession of a box of thermometers. Now, think back in your own minds to how you felt as that evidence was coming in and the impression it made on you, and I dare say when that was introduced you probably said to yourself, "Aha, here's the telling fact. This guy is walking around with thermometers just like Conforti had, just like there's been testimony in this case

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could be used to test heroin."

And I submit to you that is precisely why the prosecution introduced them. But this is the value of the right of cross-examination, and the right to introduce evidence.

Now, both Mr. Conforti and Mr. Lipsky testified based on their own drug dealings how they were instructed to test heroin, and each of them said that using a centigrade thermometer they would test heroin in the following way: At about 180 or 190 degrees centigrade, if it turned brown it was not pure. At about 230 to 250 degrees centigrade if it turned brown at that point it was pure heroin.

Now, it may be simple mathematics that a school child could do, but frankly when I first made the calculation I got the wrong answer. But you heard the chemist who took the stand to testify. The thermometers which Mr. Catino had were Fahrenheit thermometers with a top of 300 degrees and when you convert that into centigrade degrees it comes out to 148 degrees, which is well below, some 30 or 40 degrees below the point at which you even begin reading for impure heroin. In other words, it is mathematically impossible that these thermometers could be used for the purpose for which they were introduced by the prosecution.

There is a very important lesson to be learned in this, not that the thermometers themselves are so important,

because it is apparent, it is patently clear that they could not have been put to the illegal use which the prosecution wanted to suggest to you. The point is that appearances are very frequently not what they seem to be, and you have to be careful and be scrutinizing before you accept what appears to be incriminating evidence.

Now, if you should want to look at them, the calculations converting the various temperatures are in evidence. You certainly have a right to, but I think the point is very, very clearly made. Government's own witnesses testified there was never any trace of narcotics or at least of heroin on these thermometers. They never were used for any illegal purpose and they are not capable of being used for any illegal purpose. That is one major piece of evidence that is simply out of the way and has no probative value whatsoever.

Before I forget, I want to mention something which other counsel had adverted to. Mr. Catino did not testify in this case and I will tell you, ladies and gentlemen, that that was my decision. As Mr. Peluso pointed out, many of the things that he said just fit the case of Mr. Catino as well, and I am not going to bore you by repeating it, Mr. Lipsky's testimony was so vague as to date, so uncertain in terms of time, that there really is no way through the testimony of

my client of establishing for you ladies and gentlemen his presence elsewhere, his occupation in some legitimate enterprise. There simply is no way of defending against this kind of allegation. And I will tell you something else, and I venture to say you will probably hear it in Mr. Lavin's summation. I have never seen a prosecutor after a defendant took the stand that didn't say, "What do you expect? He is the defendant. He's going to come in here and lie and say anything to get himself off." That's what they always say, no matter how credible, no matter how good a witness, no matter how honest the defendant is who takes the stand. They always write it off by saying, "What do you expect, it is only the defendant."

We don't need that in this case. The testimony is so weak, so pathetically little, that this man does not need to expose himself to that kind of ridicule and that kind of criticism. Mr. Catino is not an educated man. He is not a schooled agent. He is just a simple man and he relies on the weaknesses, the lack of evidence, and the frailties in the case against him.

The second area of evidence, if you want to call it that, which was introduced against Mr. Catino, came out through Mr. Mileto.

When I opened to you ladies and gentlemen, many weeks ago in this case, I told you that very probably the

only evidence that you would hear would be from Mr. Lipsky. Mrs. Mileto decided, although she had never told anyone before the day she testified in this courtroom, that she knows Mr. Catino, and had seen him many times. Her precise testimony is really important and I hope that when you ladies and gentlemen retire you will ask for the one or two pages, the one or two sentences that pertain to him to be read to you.

She came into court, she said first of all that she had seen him in the area of the Ballantine Barber Shop on a number of occasions, in the summer of 1971. Now, the pieces of the puzzle all come together in summation, or at least we hope they do. That is what we try to do.

I asked one of the -- I think it was Detective De Luca, when he was on the stand, about the surveillance that had been conducted in the area of Seventh Avenue, and I think you ladies and gentlemen will remember that he testified there was surveillance of that area in the summer of '71.

I think it is entirely reasonable for you people to conclude that had Mr. Catino ever been seen in that area, whether there was a photograph or not, there clearly are no photographs, but if he had been seen by an officer, someone would have been in here to corroborate what Mrs. Mileto had said.

But no such testimony exists and I submit to you the

reasonable inference is that it didn't happen.

What else did she say? She said that she had been present on a number of occasions when her husband spoke to Mr. Catino. She didn't say once. She said she had been present on more than one, "several" was the word she used. Several occasions when Mileto spoke to Mr. Catino.

And she was preparing to relate to you ladies and gentlemen what she heard on those several occasions, not one, and then, as I am sure you will remember, there was an outburst in the courtroom, and the content of that you are not to consider at all. It has no evidence, no probative value, but there is an important point to be made. When we all came back into the courtroom and sat down, this woman uttered one sentence. Something about her husband said to Mr. Catino, "Did you do what you had to do." She didn't even tell us what Mr. Catino was supposed to have said back. Didn't she hear it? Isn't his response what we are really looking for?

Look at this evidence. I ask you, ladies and gentlemen, in the exercise of your good reasoned common sense, do you believe for one moment, for an instant, the testimony that Mrs. Mileto gave here? This woman was too embarrassed to finish out the fabrication that she came into court prepared to testify to, and that's why she backed off and came out with

that one teeny little meaningless stupid sentence. And that's all it was.

I submit to you, ladies and gentlemen, and I think it is entirely reasonable, the two things that we have mentioned thus far have absolutely no probative value. They are not the kind of evidence upon which an individual's liberty and life should be forfeited.

The only thing in this case that you people really have to deal with is the testimony of Barry Lipsky.

Now, I have had the very good fortune to be preceded here today by Mr. Peluso and Mr. Duke, who did an extremely competent job in explaining to you ladies and gentlemen what Barry Lipsky is all about and I rely on what they said and I am not going to repeat it to you. But I do want to look with you at the evidence, the specific sentences that he uttered about my client.

Mr. Lipsky's first testimony pertaining to Mr. Catino is about a trip uptown where supposedly a quantity of manite or cut was purchased. Now, the way the story is structured, Mr. Lipsky is the supplier of the narcotics. He is the one that supposedly is selling to Catino and these other people on 115th Street. Now, think to yourselves, ladies and gentlemen, if that is the case, why would they be going to Catino and these other people on 115th Street for

cut? Does that make sense to you, that they would be going to their own customers for this kind of thing, or is that -- does that at the very least contain an element of doubt?

Now he says, because he doesn't see anything, that on the way up there, he is told they are going there to buy cut, but he is left outside. He is left in the car. He sees nothing, he hears nothing. If he is not trusted to the point of being brought in and made an active part of this transaction, why is he told about it? Does that contain an element of doubt, an element that doesn't sit right in your minds, doesn't sit right with your good common sense?

The next thing we hear is that they are going back to this area of 115th Street and this club to see if they can sell some narcotics, and in all of these, Lipsky has a pattern which he doesn't vary, he just keeps repeating it and he can add on any number of repetitions to make his story sound strong and sound better. It is the same thing all the time, and it really doesn't matter to him how many of these little units he puts into his story.

The pattern is, "We went up there to sell them some this or some that," cocaine, heroin, whatever he's got on his mind as he is testifying. "We went there to sell them." The contact isn't initiated by Mr. Catino. They just wander up there looking for customers. Do you think the narcotics

business is really conducted like that? You go out like a door to door Fuller Brush salesman looking for people to sell to? That is just nonsense.

Now, he testified, and these are his own words, it is his own story, which is inherently incredible, many times that they went up to this club he was left outside. He never went in.

Then all of a sudden he is brought into the club. The first time that they go that he goes in, supposedly, there is a discussion about whether Catino wants narcotics, Lipsky is right in the club but he doesn't tell us one word that was said, not a sentence.

Isn't there something about that that doesn't sit right with you? This is a man who has, as he has described it, almost a photographic memory.

The second time he goes up there it is the same exact thing. He is in there, there is no conversation whatsoever, and I suggest to you that there is a very good reason. In his own mind he has a problem formulating the appropriate speech pattern, choice of words, and lingo, to attribute to Mr. Catino, so it is just a blank, it is a hole, but it is a hole that wouldn't be there if this had really transpired.

Each and every one of these occasions when he

talks about going up to the club he puts himself right there. At one point -- at one point he actually says that he was present, the conversation took place in his presence, but there is no conversation. He just -- he puts himself within earshot of these supposed drug transactions, but no conversation.

Now, let me suggest something to you: All during the trial lawyers use very, very special talents in making objections, in making requests on the law, things that require training and legal ability.

When you come to this part of the case, ladies and gentlemen, to analyzing the evidence, it is really no more than using your God-given common sense.

As Mr. Peluso told you, when defense counsel sit down, that's the ball game for us. There is no more getting up. There is no more answering anything that the prosecution may say.

When you ladies and gentlemen go into the jury room, each and every one of you should act as lawyers in the way that we have done in summation in analyzing this evidence.

Sometimes when you are trying a case you get so very close to it, and so emotionally involved in it that you lose the forest for the trees.

Sometimes weeks later you sit down and say to

yourself, "My God, why didn't I think of that argument in summation? If I had said that, it would have made it so much clearer." But you are just too close sometimes to really, really take an objective view of the evidence. Sometimes you miss some very good arguments.

When you ladies and gentlemen go into the jury room each and every one of you should be lawyers, look at the evidence, scrutinize it, take it apart for yourself, because it is no more than good common sense and reason that you bring to bear in analyzing the evidence to find its truthfulness or its lack of truthfulness.

When you look at what Barry Lipsky said, I think it is fair to state at the very least the detail, the rounded-out realistic quality, is missing.

This man has taken a notion and repeated it as many times as he thinks will convince you people of what he is saying. It is a pattern that lacks detail, it lacks color, it lacks probity. It lacks truthfulness. At the very least, and this is all I ask you,at the very least there is a reasonable doubt as to whether this man is telling the truth.

I heard a summation once from a lawyer much, much older than myself which had a thought in it for the jury that I think really contains the essence of what a reasonable doubt it. You ladies and gentlemen go into the jury room.

Forget that you have seen Mr. Catino. Forget what he looks like. Forget that you have seen this person. Just imagine for yourselves that the person who you were judging, because that is what you are, you are judges, imagine that he was covered up or in a cubicle somewhere where you couldn't see him, maybe in another room. And you didn't know who the man was. And imagine that when you reached your verdict you came out, you stood up in court, and you faced him and the man was someone very close to you.

If you are satisfied with your verdict you have done the right thing. His life, his liberty, demands no less attention, no less careful scrutiny, than anyone that you love dearly.

I think that when you look at the evidence in this case, you will, as Mr. Peluso so beautifully put it, conclude that the evidence is no better than the source it came from. If you would believe Barry Lipsky and act in your own life in something that was extremely important to you, then have no hesitation, have no doubt, convict Mr. Catino. But if, on the other hand, in your own lives, with your own children, with something dear to you, if you would doubt and hesitate -- and that is the key word, if you would hesitate -- to act on that man's word, as I suggest you certainly should, you come back into this courtroom and return a verdict of not guilty.

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MR. LaROSSA: May it please the Court, fellow counsel, representing the Government and the defense, ladies and gentlemen of the jury:

An awful lot has been said up to now, and I am going to try very hard not to repeat it. You know, we all have roles in this courtroom. Most of us have chosen ours. We are all professionals, Judge Pollack chose to be a judge, we chose to be counsel and represent our respective clients, whether it be the Government or Mr. Mallah or any of the other defendants. The court stenographer is a professional. But you by your willingness to serve and come into this courtroom are not. Most of you have never been in a courtroom before. You were chosen because people on both sides believed you would be fair and impartial, that you would show no prejudice or bias, and when it was concluded, you stood, raised your right hand and took an oath.

There are a lot of lawyers who come before juries and beg for their client's freedom, using any kind of an emotional appeal. I want no emotional appeal for Benjamin Mallah. I demand you abide by your oath, nothing more, nothing less. None of us can go into that jury room when you begin your deliberations to determine whether you have left bias, prejudice and sympathy outside. None of us will be able to determine whether or not you, the triers of the

fact, determine Mr. Mallah's guilt or innocence based upon the evidence in this case, and not upon some extrinsic facts that having nothing to do with this case.

We are also not here telling you that you should turn your head on the hideousness of narcotics. I am not in any way going to try and convince you that one who deals in something like heroin or cocaine shouldn't be put behind bars. We agree. Therefore, after hearing all of the testimony and the Court's charge, if you determine beyond a reasonable doubt as to each and every essential element of each count that Mr. Mallah has violated this law, it is your duty to find him guilty. But by the same token, if you walk into that room, probably on Monday when you get the judge's charge, and say to yourself we wouldn't be here if somebody didn't believe he was involved, or after all, there is an indictment in this case, or anything else like that, you violate and vitiate the oath you took here.

There is an indictment in this case, as there is in every case, and the indictment charges Mr. Mallah in one count, it charges him with conspiracy to distribute controlled substances, namely narcotics, and this indictment is filed and these words are presented to a man who is accused of a charge so that he will know what the charge is. It is not evidence. It is not proof of anything. In the civil law we call it a

complaint, and when Mr. Mallah walked in here and said "not guilty," an issue was framed, and that is what you are going to determine, where that issue lies.

Immediately after choosing you as members of the jury, Mr. Lavin stood up in what we call the opening and he told you what he expected to prove with respect to each of these people, and you were told that the first count was a conspiracy count.

These are some of the things Mr. Lavin told you in his opening:

He told you --

MR. LAVIN: I object to Mr. LaRossa reading my opening.

THE COURT: Overruled.

MR. LaROSSA: He told you that Mr. Pacelli distributed large sources of cocaine to Mr. Mallah.

The next paragraph states it was Mr. Pacelli's function or operation to deliver cocaine to, among others, Mr. Mallah.

Now, let's stop there for a moment. You haven't heard one word about Mr. Mallah possessing cocaine, receiving it, distributing it. As a matter of fact, you haven't heard one word that shows that Mr. Pacelli and Mr. Mallah ever laid eyes on each other before this case came into being.

Mr. Mallah, says the opening, was concerned with money. Mr. Mallah, the Government's evidence will show, was Mr. Sperling's money man. He supplied the money for the purchase of narcotics and he received the proceeds from the sale of narcotics. That is the second mention of Mr. Mallah, and he will speak to that issue.

Mrs. Mileto will tell you about her husband's activities in regard to Mr. Mallah. Did you hear any testimony about Mr. Mallah and Mr. Mileto before this morning, when after defendant rested, the police sergeant got up and said for a few moments he saw them talking to each other?

The barber shop on Seventh Avenue was a focal point of meetings between Mr. Pacelli and Mr. Mallah. Did you hear anything like that? There isn't anything in the record that shows that they met each other in a barber shop or anywhere else.

The last thing I am mentioning from Mr. Lavin's opening, "Some of the witnesses the Government will call are accomplices. They are members of the conspiracy and they were involved,as deeply involved, as the Government's evidence will show, as the defendants on trial. And they are not people the Government offers you to take home to dinner. They are people who, because of their inside position, are available to give you the true version of what happened and a

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bird's-eye view of the operations of this massive conspiracy.'

I am reading Mr. Lavin's words.

So let's start for a moment to talk about some of these witnesses and I am going to try awfully hard not to repeat what has been said before. Because there are witnesses who come in and talk about Mr. Mallah. As a matter of fact, Mr. Lipsky said something. Mr. Lipsky testified that on a given occasion he was on Seventh Avenue and Mr. Pacelli said to him, when he inquired of who the man was in the barber shop, referring to Mr. Mallah, that he was Mr. Sperling's partner in junk, were the words that were used.

Now, I am not going to spend too much time on Mr. Lipsky, because you know what Mr. Lipsky is already, I think. You know that he is convicted of taking someone's life in manslaughter. You know that he's been a perjurer on too many occasions, that you are going to have to determine when he tells the truth and when he doesn't. You know that the oath that he took here is no different than the oath that he took on other occasions. You know that he is shrewd and smart. You know that at an interview with a probation officer in Florida he was smart enough to say to that probation officer, who presents it to the judge for sentence, after being convicted by his own admission of a stock fraud charge, "I will never do anything wrong again," or words to

that effect, and he says at the same time that in New York he is deeply involved in the distribution of narcotics.

I am not going to say too much more about him because I think you have heard enough about him. There are other interesting witnesses in this case.

Let's talk about Mrs. Mileto and I think we'd best talk about protective custody. You have heard the word a lot.

Mrs. Mileto is not charged in this crime, by the way, nor is Mr. Conforti, nor is Mr. Lipsky.

Now, it is true that the Government can't choose their witnesses. Certainly the only one who could testify to a conspiracy is someone within the conspiracy. I accept that. I think you should, too. And certainly when a witness comes forward and agrees to cooperate, someone should inform the sentencing judge of that, that he has been cooperative, that he has taken the first step toward rehabilitating himself, that he is now ready to rejoin society as a good citizen.

But what happened here? Let's take Mrs. Mileto, for example. Mrs. Mileto for four years had a terrible habit. Not only did she inject heroin and other drugs into her veins and her system but she said she took just about every kind of drug. She got to the point where she admitted that she had blacked out, couldn't recall things, even on occasions when

her husband called her once and told her to take $8,000 out of a shoe to bribe two police officers because he was under arrest, she took eight pills, passed out on the street with the money, and she would have you believe that she could still conduct herself even though her legs wouldn't work.

And she tells us that there came a time in 1973 in the early spring when she came in here, spoke to Mr. Feffer or some agents, and began to answer all their questions.

Now, I say there is nothing wrong with that. Certainly one who has committed a crime has the right to come in, confess the crime, and attempt to help themselves any way they can. But didn't we go a little too far with Mrs. Mileto and every witness? Here's what happened. She came in and told them the story. She then went -- was put on the payroll at a thousand some-odd dollars a month; $250 per week, ladies and gentlemen, of your money, is paid to her. And they call this protective custody.

Notwithstanding that protective custody, somewhere outside of the State of New York, she sells narcotic drugs to a police officer, is charged -- with the distribution of two pills, I think she said, seconal pills.

MR. LAVIN: Objection to that. There is absolutely no testimony in the record of Mrs. Mileto selling narcotic drugs.

THE COURT: I think that that's right. I think you have overstated it, but I will leave it to the jury to recollect it. I think evidence was that she gave two Seconals to somebody and that was a violation of the law in the place where that occurred.

MR. LaROSSA: It is your recollection of the facts. I am talking from my recollection. If I am wrong, use yours. Don't use mine or Mr. Lavin's or the judge's.

THE COURT: She added that Seconals were a barbiturate.

MR. LaROSSA: I'm sorry?

THE COURT: I think she also added that Seconals were a barbiturate, but I am leaving the jury's recollection to be the guide and not mine at all.

MR. LaROSSA: My recollection is that she gave them to a police officer, she didn't know he was a police officer, and she told us that on another -- and because of that, eight policemen came in and placed her under arrest. That she had someone call the Bureau of Narcotics and tell them about this, that the court, wherever it was, held her in $10,000 bail, and that our Government put up the money, and had her released. Your money; my money.

In addition to that, she had her five children with her when all this occurred. So is protective custody

a license to one, get more money than a person would on welfare, $250 a week? More money than a lot of people make who work hard at an occupation. In addition to that, we pay her $400 on one month, $200 on another month, pay her moving expenses. In addition to that, Mr. Lavin feels that he must get into an automobile and drive out to Nassau County on behalf of this witness and go before a judge, not once but twice. Does this have anything to do with this charge? Absolutely nothing.

You see, when this woman walked in here to answer questions that the narcotics agents gave, she had three open cases. My recollection of it was a burglary, a petit larceny and a distribution of drugs of some sort or a possession of drugs; three charges open.

On all these cases she doesn't go to jail. From that point on she is put on Government sustenance, and she is even bailed out when she is charged with a crime.

Mrs. Mileto raise any doubt in your minds? You know, she walked in here one morning and testified, answered every question that Mr. Lavin asked her, and because I wasn't here when Mr. Lavin finished the direct testimony, Judge Pollack put it over to the next morning for me to cross-examine Mrs. Mileto. Overnight, Mrs. Mileto recalled for the first time, after being interviewed some 20 times by Assistant

United States Attorneys, by narcotics agents, facts that she would have you believe.

These are the things you can accept. You see, you can vitiate any reasonable argument that is made to you, and we can never tell why. You must determine that Mrs. Mileto is telling you the truth. If a witness perjures himself on a material fact, you have every right to disregard that testimony if you so choose, or you can accept it if you so choose.

The law has many, many safeguards for you to determine how to judge a witness, and you are going to hear about those when Judge Pollack charges you. Now, it is very simple. You can go into that room and use all these safeguards and guidelines and determine whether Mrs. Mileto has a reason, has a desire, has a willingness to lie, has a motive to testify here falsely, or ignore it. You can choose to do that.

The next witness that I must speak to is an interesting one, Mr. Conforti.

When we watched Mr. Conforti on his direct testimony, he was soft-spoken, I thought he was gentle almost in his answers. He certainly looks like a nice young man. He admitted his guilt in this case, said that he pleaded guilty, he was awaiting sentence for some six months.

He also has been placed into protective custody.

He also has been put on the payroll. The Government is supporting him as well.

Now again lets talk about protective custody, because is protective custody to protect Mr. Conforti or the public from Mr. Conforti? Do you all have the visions of what protective custody is? Is it a couple of people guarding a family or a person somewhere? Do you realize what Mr. Conforti wants you to believe? He wants you to believe that while in protective custody, receiving a livelihood by virtue of the Government's grants, he got to a phone, not on one occasion but on three or four, at will, and committed an absolute act of extortion.

MR. LAVIN: I object.

THE COURT: Mr. LaRossa, I think that there is no evidence of the crime of extortion in this record. A charge in the same way as a charge against any defendant in this case, is an accusation, and does not become the crime unless and until pleaded to as such or proved to the Court or to a jury.

I don't think that you should refer to the occurrences that were in the record in the term that you used.

MR. LaROSSA: I will not do it any further.

THE COURT: I may say also that this comment goes to any charge against anybody. The fact that a person is

arrested is not proof that he committed that crime. The fact that a person is charged is not proof that he committed that crime.

There is no proof in this record that Barry Lipsky committed the crime of murder. The proof in this record is that he pleaded guilty to the crime of manslaughter.

MR. LaROSSA: Let's talk about Mr. Conforti.

You will recall now that Mr. Conforti was asked questions basically that ran this way. When is the last time you spoke to this man, when is the last time you spoke to that man, a series of them. When is the last time you spoke to Mr. Sperling. He said in West Street at the time of his arrest, which I think was April of 1973. And on and on he went. He had neither seen nor spoken to, outside of the courtroom, any of these individuals. Remember what I told you about perjury, as to a material fact.

He is then asked about Sam Kaplan, and he states exactly the same thing, that he neither saw Mr. Kaplan or spoke to him from the time of his arrest in April until today except when he saw him in a courtroom back in July.

Then when confronted with a phone call --

MR. LAVIN: Objection. That is not in the record.

THE COURT: Stick to the evidence, Mr. LaRossa. I am not going to try and police this business of what's in

the evidence and what isn't in the evidence. I will leave it to the jury to try to recall what the evidence is. I will just try for the last time to say to you that arguments of the lawyers do not constitute necessarily a reflection of the evidence. It is your recollection of what the evidence was against what they say that governs, but it is your recollection that governs. Now, I hope I don't have to repeat that again.

MR. LaROSSA: Page 92 of this record. "Sam Kaplan, when is the last time you saw or spoke to Mr. Sam Kaplan?

"A. On my trial and West Street." That is the answer he gave.

Then he admits the phone call, as you will recall, to Mr. Kaplan. Doesn't remember exactly when it was.

Here's what he said: "On Herbert Sperling's case I saw Jack Spada. I called him up, told him to give himself up. When I was working for Herbert I made a delivery. Sam Kaplan had an operation on his stomach. I think I delivered a kilo and a half of heroin with Jack. Jack told me to contact Sammy and for $10,000 he would keep his mouth shut because he knew I didn't testify about Herbie on Sperling's case and that if -- tell Sammy that if I don't get in touch with him he knows that I am a Government witness, and that he spoke, naturally the Government would speak to me, and I would tell them that I have delivered a kilo and a half of heroin

with Jack at the hospital bed. There were two cousins of his that lived in Brooklyn that were there when I made the delivery. Jack was waiting on the level. In other words, he was with me when I made the delivery. So Jack says, if you don't contact him, he is going to tell the Government, be with the Government, and when he telle the Government, then they will tell me, 'Joe, did you make the delivery?' Naturally I will tell them yes. So he told me to call up Sam Kaplan, tell him he wanted $10,000 to keep his mouth shut."

He goes on, "Yes, because he was with me when I made a delivery to Kaplan, so I agreed with Jack, I will call him up and speak with him, and he told me not to mention his name. I contacted Sammy, I told him there's a guy there with me when I delivered the gift. I told him on the phone."

Now, I am skipping down.

What about Jack Spada? You heard testimony about Jack Spada. Mr. Conforti wants you to believe and accept that on a given day he picks up the phone, calls Sam Kaplan, demands $10,000, because of a phone call he got from Jack Spada.

Now, let's think about the Jack Spada testimony quickly for a moment. Jack Spada, he says, is a fugitive at the time. He sees him out a window of this courthourse getting out of a taxicab, calls Jack Spada, at a number in

Harlem that he knows about on a public phone, tells Mr. Spada he ought to come in here, and at that point Spada tells him, "Contact Kaplan and try to get this money."

In addition to that, he tells Spada on that occasion, "Jack, I just got off the stand. I testified against you today. I told them everything about you."

Spada says, "Yes, I know. Now go get $10,000 from Sam Kaplan. Otherwise I'm going to come in and talk about him." That's what he would have you believe, that he just got off the stand testifying against a man who is a fugitive at the time, picks up thephone, calls the man, and the man says, "Go get $10,000 from somebody so we'll keep our mouths shut or I will keep my mouth shut."

Why did he call him? Here's what he said:

"Yes, I tried to help because I helped the man. I didn't say anything on the Sperling case. So Jack would have mentioned it. Then I would have. Then this court would know that I didn't keep my mouth shut from Sammy Kaplan since the beginning."

Listen to the words:

"And you didn't think there is anything wrong in doing that?

"I was just helping the man, trying to help. That's the main thing that came to my mind."

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At this time he is in protective custody, getting paid by the Government.

This question is asked him: "Did Mr. Kaplan say to you on the phone, 'If I don't pay the money I get framed'? Did you say 'That's right, that's the way it is'?"

The answer, "I think so. I'm not sure, but --

"Q. Did you say it?

"A. I don't remember word for word, but I think that's about it. I'm not sure, but the way it came out, maybe that's the way it is, because Jack didn't want -- didn't want to know nothing except the $10,000 and I got him from 20 down to 10."

Another point, "I told him I had to testify. I mean the Government -- I am in protective custody and the Government wants to make me testify, that I know -- knew the people I've been talking about, I would have to testify. I had no way out unless they pull the bail and I go back to jail." That's what he said.

Then he was asked questions about Mr. Kaplan:

"Q. Did you say that they kept on pumping me about you?

"A. Well, I had to convince the man to give up the money. Just trying to help Mr. Kaplan, but I had to convince the man to give up the money.

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"Did you tell Mr. Kaplan, 'I go for sentence in another week or so'?

'I think so. I'm not sure.'

"Did you tell him 'They are going to move another indictment on you'?

"A. Well, if Jack brought in his name, it had to be an indictment because Sammy was dismissed from the trial."

"Did you say, 'When I'm over with this, man, they are going to slam another one on me'?

"A. I think so. I'm not sure.

"Q. Did you say to him, 'they promised me one thing if I look good on the stand'? Did you say that?

"A. I don't remember. No sir, I don't think so.

"Q. Does that refresh your recollection that you told him on the tape on the phone that you are coming up that week or so for sentence?

"A. Yes, and I lied."

Mr. Conforti wouldn't touch a number of items in this courtroom because he said he made a vow never to touch anything that had handled narcotics. He made a vow to his family, as he said. Sounds admirable. But he also would not touch exhibits when they were handed to him. He refused to read things, as you might recall.

Listen to what he says. "Well, I had to build up

an image to get money from Sammy no matter how it was done, to make it " The image has to be built up. It had to sound important to get Sammy to get this money from him. In other words, the only purpose to this phone call -- that is the question -- the answer -- was to get money.

This was read into the record:

"Mr. Kaplan; I don't believe this. In other words, they are framing you, too?

"Conforti: On the stand they say this and say that. I am doing this and I am doing that. They know it's --

"Kaplan: So what do they want from you now?

"Conforti: I don't know. All I know, I got to go two more cases.

"Kaplan: In other words, if you don't lie they are going to hang you?

"Conforti: Yup.

"Kaplan: Huh?

"Conforti: That's the way it is."

The day he was arrested he said he didn't have a penny. On the phone he offers to throw $2,000 in toward Mr. Kaplan's money. Savings, he tells us.

I am going to talk about Mr. Mallah in a few moments, but there are times when someone might say, "Why don't you come in and show where you were on a particular

time, even though it is two or three years ago. Search your memory, get out all your records, go over everything you can and try to prove where you were on a specific date.

"Conforti said he met Ben Mallah in the Stage Delicatessen. You defend this testimony. When was it?

"I think it was the end of '72 or the beginning of '73.

"Is that the best you can do on dates?

"I don't remember.

"Do you remember what year it was?

"'72.

"Are you sure of that or pretty sure of that?

"Yes.

"Do you remember what month it was?

"It could have been September, October. I know it was cold. I had a heavy coat on."

Defend yourself against that meeting. Mr. Conforti was asked whether he expected to go to jail on this particular case. Do you remember what his answers were? He said that is not up to me, that is up to the Court.

He said, "I did something wrong, I have to pay for it."

"Do you expect to go to jail?

"Whatever the Court decides.

"Are you testifying because you don't want to go to jail?

"I am doing this, testifying, because it has been brought up so many times, one case links to another.

"Are you testifying because you don't want to go to jail?

"I am testifying because I am doing a right thing, and if I go to jail it is up to the Court."

Admirable?

"In other words, you are doing this because you feel it is the right thing for you to do?

"Yes, sir.

"And you are being a good citizen in doing it?

"I may have a second chance in life to start all over again. No matter if I go to jail or not."

It is the same man who picked up the phone and called Sam Kaplan.

Do you remember this automobile that was parked? The witness identified it in Exhibit 61-B, the back of the car. And they testified that they put air holes in the side. Do you remember that?

And Mr. Lino said he climbed in there with a pillow and a walkie-talkie to listen to a conversation. Now, you know that these acts are done, and you know that they have

all kinds of equipment, and you know that electronic equipment, do you not, can pick up anything that the ear can. Was there a recorder in that car? Was there a recording made of that conversation? Does it make sense that there would be? And if there was, why isn't it here? Is it because it is different than what Mr. Lino says?

He sits in the back of a car for some three hours after hearing a conversation, writes not a note, and yet on the stand here, some two years later, he tells you he remembers the conversation basically word for word. There is not a word in there he doesn't remember, he said. Got an excellent memory.

And while the man is standing next to the car with the air holes that he can hear the conversation clearly, he is talking on a walkie-talkie to the fourth floor of a hotel.

MR. LAVIN: Objection. That is not the testimony.

THE COURT: All right. Now, I am not going to break in on this again. I will leave it to the jury to decide what is or isn't the testimony. I think we have had that sufficiently now so that the jury will test everything that they hear against what they recollect the testimony was. If a lawyer goes overboard you know it.

MR. LaROSSA: And he speaks on the walkie-talkie to the fourth floor or whatever floor of that Wellington

Hotel, and he asks, the sergeant who testified, "Who is speaking?" Do you remember that? It is interesting to note that he can hear every word from outside the car and yet the parties leaning against the fender of that car can't hear a word from inside, however it is carried to the fourth floor of a hotel somewhere down the block. Do you buy it? Do you accept that as true?

Susan Weyl? I am going to say one word about Susan Weyl. You saw her on the day that she came into a courtroom, it wasn't this court, I don't believe. I think it was the sixth floor. You saw her climb up on that stand, you saw her answer questions. You determine whether she was telling you the truth when she said she was under the influence of nothing that day. That is for your determination.

What of Mr. Mallah then? He is charged in the indictment with Mr. Pacelli, Mr. Catino, Mr. DeFranco, Mr. Barrett, and many others, all the ones that are on trial here. He readily admits that he knew Barney Barrett, but tells you on the stand that he never met any of the other gentlemen sitting at this table, and we have the advantage of the Government's long-range cameras taking pictures, and Ben Mallah is telling you the truth. He does not know any one of these people except Mr. Barrett.

If he was telling a lie, sure enough we could pull

one of these pictures out of one of these folders and prove it to him awfully quick, couldn't we?

You know, a man for 17-odd years works the Stage Delicatessen, and I think most of you have heard of the Stage, it's got some entertainment kind of notoriety to it, in a sense. You know the people who are entertainers or show people or sporting fans go there occasionally, we found that out from one of the witnesses.

Can this man have fooled the kind of people that walked into this courtroom on a daily basis? Do you think that an entertainer like Mr. Graziano is going to use a bookmaker who he knows is involved with heroin or cocaine? That the counterman and the waitress at the Stage and the people who run that place would even allow him in on a daily basis and they'd bet him and take bets for him? By the way, he is not charged with bookmaking here now. This has nothing to do with it.

He admitted what he was. I'd have preferred that he could say he was a doctor or a dentist if it was his true profession, but he is not. He's been a bookmaker all his life, and they would have you believe that every one of those witnesses were lying to you because you know why? Can you believe that a guy who takes $75,000 on one day or 50 on another day and takes the kind of money that they are talking

about goes down with his little sheets and takes a five-dollar bet from that taxicab driver?

Does that make sense to you? He comes down to the Stage every morning to pick up the action, the bets. That's what they want you to buy.

Don't forget every one of those witnesses that came in here said, I know him 17 years, I know him 20 years. I think one said 25 years. Damon Runyon, some of them, right out of the pages. Broadway, no question about it. Gamblers? Each and every one of them. He is a gambler. That's not what they are charged with here. Certainly not.

Another thing. You know, if he really worked at this all his life to plan the things that he should have done to prove to you that he really isn't a big dealer in narcotics, he would have had to start many years ago. Let me tell you why: He made sure that he got judgments against him. Can you imagine a guy walking around with $75,000 and Household Finance he owes money to? He was convicted of a crime in 1969. Do you know what the crime was? You heard it. He went into a bank and got a loan, and on the loan he put a false statement, the statement being that he had a job, and he didn't have a job. You can't put down you are a bookmaker and get $3,000, can you?

But does a big junk dealer walk into a bank and put

down a statement like that? Does that make sense? Can you ignore that?

Now quickly, almost every witness that's testified here has said, "I saw Ben Mallah sitting at a table and heard someone else say." Each and every time. Mrs. Mileto said, "I saw him in Sperling's apartment twice, on two different occasions."

Mr. Mallah says, "It's a lie. I have never been there."

Two different occasions, she doesn't hear Ben Mallah say anything, in effect. She says he is a soft-spoken person the first time, I heard Sperling, but I didn't hear him.

Then the second time, she says, "I heard Mallah say,'Isn't that too bad' or some such thing, words to that effect."

Then you've got a conversation in the Stage Delicatessen which Conforti relates and by the same token he says, "I never said anything more than hello to the guy, or when are you going to Florida." We never said anything to each other, Conforti says, yet he testifies about a conversation at the Stage Delicatessen with Ben Mallah sitting there.

No one puts anything in Mr. Mallah's hands. No one puts him in a car that is associated with the distribution of narcotics. Nobody puts him anywhere where there's narcotics,

except for that Conforti statement that she remember the next day. She said there is some white powder in bags sitting on the table and Mallah says, "Do you have enough money?" 20 interviews and she never remembered that.

This money in his apartment? Certainly. Certainly it was in his apartment. What do you do when you are a bookmaker? Do you take it and deposit it in the bank like you do if you are a lawyer? Do you keep a checking account, a special account and a regular account? Do you pay off your bets by check? Use a little common sense now. He can't run away from what he is. But is he what they are charging him with? Did he think that he was going to run from this indictment in April 1973, so in May of 1972 he starts to use a different identification? He tells you he's been doing that all his life.

Now, Mr. Lavin is going to try and convince you that he left Florida to avoid that indictment that was filed. The testimony is that about on the 15th of April Ben Mallah goes downstairs, comes up, says, "There's some trouble," packs his bag, and leaves Miss Nancy O'Malley. Girl friend of his for some -- friend of his, I think he said, for some 17 years. All right?

Now, if it is true that he called New York and found out about this indictment charging him in a major

conspiracy case, where do you go, ladies and gentlemen? Where could you run to? Do you run from Florida right back to New York? Do you move two blocks away from where you used to live or do you go to Chicago or Detroit or Des Moines or San Francisco? Do you get as far away from the place where everybody knows you, or do you come right back and move two blocks away? Do you go back to the Stage? Do you go back to the bars and haunts that you were at all these years? Is that what you do when you run? Think about it. Isn't that what this is all about? Look at that toupee and look at him. He needs one. It isn't a disguise. It is a necessity. A man who has a full head of hair and has a wig, it might be a disguise. No disguise with him. He can't hide that.

Sergeant DeLuca today? You mean to tell me he stood up there and took all these pictures and just didn't happen to take that Ben Mallah picture? Or is it that they are terribly afraid that this thing was slipping away from them so up gets DeLuca and says, "Oh, yes, I saw him on the 16th. Didn't take his picture. Saw him with Mileto for a moment or two." And then the youngster, the 15-year-old boy, and those of us that have children in that age group appreciate that, I think, when was his name ever mentioned as being part of any of this? Did Mr. or Mrs. Mileto take him along when they were doing major heroin transactions when he was

twelve years old, bring him into the apartment and the barber shop? Does that make sense? Did that boy come in here like any other boy would do and do anything to protect his mother? Would you expect that? You saw the trouble he had finding Mr. Mallah. You saw the trouble. He looked around the courtroom two or three times. And he got help from a picture. Inadvertently left on a desk? What that boy's been through, after hearing his mother's testimony, why challenge him from coming in here and doing that.

Benjamin Mallah is not guilty of these charges. He is at the wrong place at the wrong time. Outside of Mr. Barrett who he knows on Seventh Avenue, he's never met a person at this table. Yet he is charged with sitting down and entering into a conspiracy with them.

Now, you can walk into that room on Monday or whenever, and deliberate in such a way that you will not sit down and fairly handle this, and we will never know. There is no way we will ever know. We will just accept your verdict, whatever it may be.

But you know what your oath is and what you promised, and all I want from you is to abide by that oath, go in, look at the indictment, look at the evidence as against each individual, look at it against Mr. Mallah, and if you are convinced beyond a reasonable doubt that Mr. Mallah entered

that conspiracy, and did what it charges, it is your sworn duty to come out and find him guilty. But have the fortitude and courage that if you have a doubt that is reasonable, and it will be explained to you what that is, have the honesty and the sincerity to come in here and send him home. That is all I ask. I know if you think this thing through that is exactly what you will do.

Thank you.

THE COURT: We will take a five-minute recess.

(Continued on following page.)

MR. LAVIN: Good afternoon, ladies and gentlemen.

You have been this morning to five very good lawyers giving you what they think the evidence in this case shows.

I would like to just briefly resond to a few of their points while I have them in mind.

I recall Mr. Duke told you on one occasion that he read some testimony yesterday into the record that was about a surveillance of a Valentine buy at the Yellowfingers Cafe, and he read the whole thing, and he said his conclusion was that Mr. Lipsky did not testify about that at this trial because he had found out that he was under surveillance.

Well, the reason that he didn't testify about it at that trial was that those persons were already convicted, as Mr. Duke well knew, and there was no reason to testify.

MR. DUKE: Objection.

MR. PELUSO: Objection.

MR. MITCHELL: Objection.

MR. LA ROSSA: Objection.

MRS. ROSNER: Objection.

THE COURT: Ladies and gentlemen, it is my duty again, despite the fact that I have said this before, you are admonished, you are instructed, you are implored, using any

word that I can indicate to you, to erase from your minds any of the argument of counsel on either side, and particularly that last comment, which has nothing and no support in the evidence. It is the evidence in the case which governs, and nothing which has run outside of the evidence, and there have been indications on both sides now of a comment which should not have been made that doesn't relate to the evidence.

Let's get on with the evidence, Mr. Lavin, and your comments about the evidence, and not things that are not in evidence. Let's not have it happen again.

MR. LAVIN: Yes, sir.

Mr. Duke also mentioned that for a good part of two years, that Ballantine's Barbershop was under surveillance. I believe that the testimony in the record will show that there were two periods of surveillance of Ballantine's. One was from July-August 1971, when surveillance was stopped, and again surveillance was picked up again in August of 1972, ayear later, where it continued, I think, until November or December. So it wasn't a two-year period.

I also believe that someone mentioned that there was surveillance conducted all over town. I don't believe that that was in the record.

Mr. Duke also accused another Assistant United

States Attorney here of suborning a perjury of a witness, Mr. Lipsky, in the grand jury. That perjury was supposed to have to do with --

THE COURT: I have a note up here which I will mark as Court's Exhibit 53. Motion is denied.

(Court's Exhibit 53 was marked.)

MR. LAVIN: I believe the facts of that were that Mr. Lipsky had a telephone call between his lawyer, Mr. Gwinn, and Mr. Feffer, and it was agreed that Mr. Lipsky would not be prosecuted for what he talked about; and I think there was some evidence or suggestion that it was everything. I think the evidence was equally suggestive that it was narcotics and Mr. Feffer thereafter put Mr. Lipsky in the grand jury, and he read him his rights, and among his rights were the statement that, "Do you know that this evidence can be used against you in a court of law?"

Now, Mr. Duke would have you believe that, having made this arrangement previously, Mr. Feffer having asked this witness in the grand jury about his rights, is suborning perjury before the grand jury.

One general theme that I think ran through most of defense counsels' summations, or the most that I can recall, is that most of these witnesses came in here and lied, but there was also another strange thing that ran

through their summations, that these witnesses, some of them, Mr. Lipsky in effect didn't say enough. He was down with Mr. Catino, he heard conversations, and there was a complaint he didn't say anything aboutthose conversations, he didn't say what they were. You are also being told that he was lying about these things, that he didn't have them, but yet they are complaining because he didn't tell you the conversation he was supposed to have overheard.

A lot of points were made, and I hope as I go through the facts, that I can clear them up. One thing I might say is that you heard a lot of talk here about smokescreens. A smokescreen in the Navy is when you are trying to hide something, and you blow a lot of smoke around so that you can hide what is going on behind the smoke, and in this case what is goingon behind the smoke is the facts of this case, the evidence.

I would like to first touch on Mr. Conforti. I am not going to stand here and try to tell you that what Mr. Conforti did when he called up Kaplan was justified, was legal,was right. I am not going to tell you that, but I am going to suggest to you that where you heard it from was that witness then, from Mr. Conforti when he was asked about it, and there wasn't one thing he was contradicted on. He admitted it.

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I think that no matter how you want to characterize what he did, it certainly wasn't right. He withheld information from the government, and he told you he did. He withheld the address or the telephone number of a fugitive in this case, a narcotics fugitive. That was certainly wrong. He should have told us that.

But I think that we will show you that his testimony was truthful, because Mr. Conforti has only one thing to gain from testifying, as he told you, that his cooperation would be brought to the attention of a judge who was going to sentence him. This judge sitting here is going to sentence him. Mr. Conforti is admitting that he hasn't cooperated.

If he was lying, and his main concern was his sentence, he would have said he would have lied about that. He would have denied it, but he didn't. He told you things that didn't come out. He told you that he made a delivery of a kilo and a half to Kaplan which he never told anybody about in the government until he sat there in that witness stand. A kilo and a half of heroin he delivered to Mr. Kaplan.

It was an interesting point. Someone asked him, on page 287, "Do you know when you spoke to that agent, that Mr. Mileto had delivered narcotics to a hospital, to

Mr. Kaplan?"

Mr. Conforti answered, "I delivered the narcotics. Not Mr. Mileto, I delivered them."

It is a perfect opportunity for him to say, "Yes, Mr. Mileto delivered them." Who is going to contradict him, Mr. Kaplan? Is he going to come here and say, "Yes, Mileto delivered the kilo and a half to me, or Conforti the kilo and a half to me"? He is not going to do that, and Mr. Mileto isn't going to come in here and testify.

I think that just points up the fact that what he testified to here on that stand was truthful. He just laid it all out. He told you what he did. He told you what he didn't do. He told you what he hid from everybody. He told you everything.

If Mr. Conforti was so interested in putting people in to help himself, he could have done a lot better job than he did do.

In other words, Mr. Mallah's lawyer got through explaining to you Conforti never had a conversation with Mr. Mallah. He admitted it, he never had a conversation with Mr. Mallah.

If he was here for the sole purpose of zinging Mr. Mallah, he could have gone upstairs with the $60,000 that time. But no, he stayed down in the car, as he

testified, seeing this man come down who he didn't know, and it turned out later, as Conforti told you, it was Ben Mallah.

He testified about another incident in the Stage Delicatessen where a bunch of people were sitting around, and Mr. Barrett mentions something to him about mix; but he didn't mention a thing that Mr. Mallah said. Mr. Mallahdidn't say anything, so he didn't tell you that he said anything. He told you the truth.

Here is a portion of Mr. Conforti's testimony. It's on page 161:

"Q How many times have you and Mr. Mallah spoken to each other?

"A Just hello, and that was it.

"Q That was it, nothing more than that to do with narcotics?

"A No, I never spoke to the man.

"Q Did you ever talk to him alone?

"A No, sir, we said hello and that was it."

You have been told that you are the triers of the fact, You are. You are the only ones here who can judge the credibility of the witnesses. Take into consideration everything, but just listen or try to recall the witnesses as they were on the stand.

Recall Mr. Conforti. Was he hiding anything? He told you things that no one knew. He told you about the delivery of a kilo and a half which he could be indicted for.

I would like to say one brief thing on protective custody. It's been brought out that either all the government's witnesses in this case are lying for reasons of their own or being paid to come up here and lie or are lying to protect members of their family, and that covers, as I counted, about six or seven people, and of course not including the officers who were on surveillance and the officer who was in the car. They are lying because, I suppose, they are police officers and it is expected these days that police officers are going to lie.

But also recall the testimony of Mr. Mallah when he took the stand. I will get to that later.

You have been told what the government is going to say about its witnesses, that they don't select their witnesses. The government doesn't select its witnesses. They take people as they find them. These people, as I told you in the opening, were all members of the conspiracy, all equally as guilty, all equally as involved. Not equally, but certainly culpable.

Mr. Lipsky, Mr. Conforti, all involved.

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If the government could pick their witnesses, they would pick people who are beyond reproach, rabbis, ministers, priests; but rabbis, ministers and priests don't get involved in narcotics. It's people like Lipsky and Conforti and Mileto and Susan Weyl. It's the people that these people deal with. They pick them. The government doesn't pick them.

I would like to briefly go through what I submit hasn't been done, the evidence in this case, and what is shown.

In 1970 Lipsky says he comes to New York and he starts living with Benny Fabre. In 1971 he meets Pacelli, meets him in a discotheque.

Pacelli tells Lipsky, "I know what you done in Florida. You perjured yourself."

Well, I don't know if those are the exact words, but anyway the implication is, "I know what you done," so he asks him in April of 1970 to go to an apartment at 1420 Third Avenue and to make some money, there is going to be some money being made.

Lipsky knows at that time that Pacelli is involved in narcotics. He goes up to the apartment some time in April of 1971. That night Pacelli comes into the apartment carrying the suitcase which he tells Lipsky contains, I think, it's 8 kilos or 10 kilos of pure heroin.

Lipsky stays in the apartment for ten days, ten to fourteen days he testified. During that time Mr. Pacelli comes up, removes packages, sometimes once or twice a day, sometimes he skips a day.

There were just minor bits of corroboration. He also testified that Mr. Pacelli told him to get the door strengthened to protect it, put some metal on the door. Mr. Lipsky testified he went to an 86th Street locksmith and he had the locksmith come down and put new locks on the door. There is the bill. You have seen it, Government Exhibit 12 for $90, install metal sheets on the door. It doesn't mean much, because it could be Lipsky's door, it could be Lipsky's narcotics in the apartment, but that is just one of the pieces in the puzzle, ladies and gentlemen.

Pacelli tells Lipsky to move into the apartment. Lipsky does so, and he starts paying the rent, and he pays the rent under the name of Wilfredo Cintron to Mr. Stanley, to Mr. Stanley who identified him. He starts paying the rent. Another small piece of insignificant evidence, just a piece of the puzzle. It doesn't mean anything by itself.

He also tells you that he had a telephone put in in the name of Harold Stella, and he pays the telephone bills. Another piece of insignificant evidence. It could be Lipsky's.

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He also tells you that during that first period of time he went to Pacelli's apartment, Pacelli's girl friend's apartment, where they picked up the narcotics paraphernalia. Not that paraphernalia, but something similar, mixing equipment strainers, thermometers, sealer machines. Then he brings it back to 1420 Third Avenue.

Shortly after moving in, Mr. Pacelli first instructs Mr. Lipsky how to dilute or mix narcotics. Lipsky testified in detail just what that procedure involves, straining the heroin and the mix through a strainer, mixing it up, bringing it back, putting the end product, diluted heroin into plastic bags which were sealed with a sealer of that type there, a heat sealer.

The bags they used were 1/2 kilogram bags. That is 1.1 pounds of heroin, cocaine, or whatever it is.

During that first month, the first period Mr. Lipsky is also instructed by Pacelli how to test narcotics, and he went into detail on that, the varius tests for heroin, the acid test on the upside down coke, on a whiskey glass, and the thermometer which Mrs. Rosner went into detail about.

Mr. Lipsky also testified that Pacelli instructed him or he knew that you test for cocaine by rubbing it on your gums. You rub some on your skin. If it dissolves, it's cocaine, it's good quality.

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After a while, Mr. Lipsky, on Pacelli's instructions, begins deliveries, and they have a pattern. This pattern, it has been suggested, is too pat. You have been told that it's always the same.

Of course, it's always the same because it's a very good way to deliver narcotics. You get a key to a car, someone else's car, especially someone else, not the buyer, not the seller, but someone else's car, a stolen car. Get the registration, get a phony registration, get a set of keys. Take the car, put the narcotics in, park it somewhere. That is better than walking around carrying narcotics. It is better than walking into the Hippopotamus with half a kilo of heroin on you, and to give it tomsone and walk back out and you both take a chance of being arrested.

This way only the runner, in this case Lipsky, is taking the chance. He goes to the apartment, picks up the heroin or the cocaine, puts it in the car, and parks it somewhere, goes back and gives the keys to the person.

The person who has the keys can go down to the car at his leisure, and he just can watch, watch for a little while, and if there is no one around, he can pick up the narcotics. If there is anyone around, it is not his car, it is someone else's car.

Of course, the procedure would differ whether

they were buying or selling narcotics. If they were selling narcotics, they would use the person's car. They would take the keys from the person who was buyingthe narcotics, put them in that car, park it somewhere, give the keys to the person.

If they were buying heroin or buying cocaine, the procedure would be a little different. The person who was selling it, in many cases Mr. Mileto, would supply the car.

Mr. Lipsky also testified that in the latter part of 1971 the stash was moved for many reasons to the apartment of Susan Weyl down in 9th Street.

You heard Susan Weyl testify that she asked Pacelli for some money,and she asked Barry, and she saw both of them come up there with packages. They both talked about heroin, and heroin was mixed and tested in her apartment.

After a while Mr. Lipsky had also added other details, other jobs to perform. He accompanied Pacelli to pick up money from sellers of narcotics, to pay buyers, and he would exchange that money in banks, small bills into large ones, small bills into hundred-dollar bills. That way youcould get a lot of money in a small package. This is $8,000 in this package, for instance (indicating).

Starting in May and June of 1971, there is a series of transactions involving exchanges from Lipsky to the barbership to the social club on 115th Street to the Hippopotamus, the Yellowfingers Cafe, and while this was going on, while Lipsky is beginning to start delivering narcotics, his co-equal, if you will, almost co-equal on the other side with Mr. Sperling, Mr. Conforti, is first starting to be broken into the narcotics business.

He has been established as a worker for Louis Mileto, Conforti, and in June of 1971 Mileto starts leaving stuff there in his station, mix, as he tells Conforti. Mileto and his wife, Cecile, start visiting the station.

Conforti testified to that. Cecile Mileto testified to that. Cecile stayed outside, and Louis Mileto went inside, mixed up some mix. The evidence doesn't indicate it was anything other than mix at that time. He puts it in paper bags and leaves the station.

At one time Conforti told him he wanted the packages out of the station. He has started to worry to Mileto, and he begins moving the packages. He moves some four of them to Conforti's house, to the basement. Those packages later turn out to be heroin, mixed heroin, and he moves the rest of the mixing equipment to an apartment in Queens, the apartment of Zelma Vance, a girl Louis Mileto met downtown

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in Pemble's .

He puts them in this trunk, the trunk that Mrs. Vance recognized.

But Conforti says he is worried, he wants to be introduced to the person that Louis is working for. In case there is any problem with the narcotics, what should he do with them?

So Mileto takes him down once to the barbership on 57th Street where he points out Sperling, takes him down on another occasion where Conforti is introduced to Sperling in the barbership.

Some time in the middle of July Mileto asks Conforti to accompany him to Philadelphia. On their way down there, Conforti is driving the car, they are stopped for speeding. Conforti says Mileto was very nervous. He finally told him he had a kilogram of heroin in the car.

They do get to Philadelphia where Mileto picks up $60,000 in a package with silver and green stripes. He shows the money to Conforti.

They drive back up to New York; there is a conversation between Mr. Mileto and Mr. Conforti. Conforti says, "Who is the money for, Herbie?" Then Mr. Mileto said, "No, it's for Benny, Herbie's partner."

And he goes on to describe, at Conforti's urging,

what Benny's role in this thing is.

Who is Benny? Benny is the guy, Mileto tells him, that is Herbie's backup men for the money, the backup money for junk in case he needs to buy -- in case Mr. Sperling needs money to buy stuff.

They go back up to New York. Mileto makes a call to Sperling, tells Conforti he needs $17,000 more. He goes to 125th Street.

Conforti meantime is given $6,000 which is to be exchanged at the banks for large bills. These are the small bills that were in the $60,000.

They go down to 5 Spring Street. You heard a lot about 5 Spring Street, Mr. Sperling's house. Mileto takes the package containing approximately $77,000. He takes it upstairs. Conforti is sitting downstairs.

A few minutes later someone comes down -- Conforti doesn't know who it is at the time -- with the package. He recognized the package under his arm. He asked Mileto. Mileto comes down and he asks him, "Who is that?"

He says, "Thatis Benny Mallah."

And Mr. Conforti identified Mr. Mallah in the courtroom as the man he saw that night coming downstairs with the package.

During the summer of 1971, Cecile Mileto also

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testified that she went with her husband, Louis, while he made deliveries of packages to places, a lot of packages, Wetson's Diner, a package to a man in the diner, Eva's Lounge, a package which she looked into before Louis delivered it, which contained white powder.

During that summer she and her husband, Louis, go to 5 Spring Street, and in the apartment is Josephine Sperling, Herbert Sperling, and the defendant Benjamin Mallah. On the kitchen table Mrs. Mileto testifies there were eight to ten bags of white powder which Sperling was in the process of putting in a shopping bag. Mallah asked Sperling if he was going to have enough money for this. That is all the conversation.

Cecile and Louis Mileto leave with the shopping bag. Louis never tells her what is in the shopping bag. She sees the white package. He never says whether it's heroin. The bags never come upstairs to Cecile Mileto's house.

She also testified that she and Louis are going frequently to Ballantine's in 1971 in the summer. She identified the defendant Alfred Catino. The defendant Alfred Catino she said, if you recall when I asked her, "Do you know Alfred Catino," she said, "Who is Alfred Catino?" Al, she knew him by the name Al.

You will also recall the testimony of Zelma Vance, the girl in Queens, the girl whose apartment Louis Mileto was using as a stash. I don't think anybody ascribed any motices to Mrs. Vance for testifying her. No one mentioned she was getting paid. She wasn't here to lie or to protect herself, but she corroborated very important parts of the story. She corroborated much of what Conforti said up to that time about the trunk, about the moving in, about Louis coming there, about Louis using the apartment as a stash, although he told her he was using it for gambling, that he was a gambler. He had her leave the apartment that night while he used the apartment.

She also testified that she recognized, because she had met him, Mr. Sperling's voice on the telephone who used to call asking for Louis.

It is in the apartment that Conforti, like Lipsky, is first instructed in how to mix, how to test heroin. On one occasion when he is mixing, Mr. Mileto opens the trunk, and inside is 8-1/2 kilograms of pure heroin. This sounds incredible, doesn't it, ladies and gentlemen, 8-1/2 kilograms of pure heroin.

First of all, Conforti testified that one was tested, and eventually one ends up right here on this table. It's a kilogram of heroin, ladies and gentlemen.

He also teaches Conforti how to mix, the same procedure, mixing it up six or seven times so that you can dilute pure heroin into seven kilos. You take a kilo of pure heroin and dilute it into approximately 7 kilos or 5, so that it can be spread out even more on the street.

He testifies that he delivers the four packages that are in his apartment.

So what do we have in the puzzle so far? Pacelli is using Lipsky as a worker. Lipsky is living in the apartment in Third Avenue, he is delivering narcotics, he is mixing,he is testing, and eventually Susan Weyl is a stash.

Sperling and Mallah and Louis Mileto, Joseph Conforti and Zelma Vance form the other side of this conspiracy. They get together. Lipsky and Pacelli go to Ballantine's Barbership on occasion.

We have heard a lot of talk about these two photographs here. What do they prove, Government's Exhibit 8? Cecile Mileto identified these. The ones under thisthing are her writing. She identified Herbie, Louis, and that's all. This is Ballantine's Barbership.

Mr. Lipsky said that's Herbie, that's Louis, that's Pacelli, and again it's Ballantine's Barbershop. What does it prove? I don't think there is much doubt about this

one. This face is covered. Look at both of these pictures, ladies and gentlemen. You identify the persons in those pictures. There is Mr. Pacelli in front of Ballantine's Barbershop.

Mr. Duke asked you, "Is that some kind of a crime?" It's not a crime to stand in front of Ballantine's Barbershop; of course not, it's ridiculous.

But it certainly corroborates Barry Lipsky in that he used to go down there, and he used to go down there for narcotics transactions, as you will see later on.

On one occasion down there, there is a group of people outside. Lipsky asked, as Conforti did, as anyone in the narcotics, "Who are those people?"

"That is Louis," Pacelli says, "Herbie's worker, and that is Benny Mallah, Herbie's junk partner;" not his partner in junk. Small distinction.

So in the six or seven months of 1971 from June to December, late December 1971, there is a series of transactions between Pacelli, Sperling, and Mallah, where they make pickups of heroin and deliveries of cocaine.

Lipsky testified in May and June of 1971 he and Pacelli drove to Spring Street. Lipsky remained in the car.

Pacelli came down and said, "Herbie is not there."

They went to Limehouse. LouisMileto came in and

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he was introduced for the first time to Mr. Lipsky.

Shortly after that time, within a few days, they go back down to Ballantine's Barbershop, and Pacelli is observed by Lipsky talking to Benjamin Mallah, Louis Mileto, in front of the barbershop, and Herbert Sperling. He doesn't hear their conversation. He doesn't know what they are saying. They are talking; that is all he testified to. They are talking in front of the barbershop.

If he was really interested in putting these people in, he would have added a little bit, "I walked by, I heard him talking about junk."

He didn't do that, ladies and gentlemen, because that is not what he heard and that is not what he testified to. All he testified to was what he observed, Mr. Mallah, Mr. Sperling and Mr. Mileto and Pacelli in conversation.

Mileto comes over and says to Lipsky, tells him there is an old black Ford on Spring Street. Black Ford, very insignificant point.

Lipsky goes down to Spring Street, picks up the black Ford, takes it to 1420, puts a half key of coke in it, goes to 57th and First and gives the keys to Mileto at the Optimo Cigar Store.

That same black Ford, you will recall that Mr. Sperling told Conforti that Louis Mileto was using that as

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a safe car, but Conforti said, "That is my car."

I don't know if it's the same car, a black Ford, a beat-up black Ford.

May and June of 1971 Lipsky meets the defendants Catino and De Franco, and they pick up mix. In June and July Lipsky goes to a social club on 115th Street between First and Pleasant Avenue, not on 115th Street, not the whole 115th Street, but 115th Street between First and Pleasant Avenue. Inside the club Pacelli introduces Lipsky to Catino and John Fazzalari. There is no transaction that night.

Shortly after that Lipsky and Pacelli go to the club. Pacelli has a conversation with Catino and Fazzalari. Lipsky doesn't hear the conversation.

Some people are going to complain that he should have heard it, he should have said something. If he did, he would be a liar. If he didn't, he wasn't there. You can't have it both ways, ladies and gentlemen. He is just telling you what happened when he was in the club.

Pacelli tells him, "I am going to mix up some junk." They get a red Chevy, and the same procedure -- it's very boring. It's very boring, the same procedure. Unfortunately, that is a good way to work business, ladies and gentlemen.

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But this time, this is early in the proceedings, and Lipsky is not that familiar with the operations, the testing, the mixing of heroin. They drive up to 1420, and they mix up 3 or 4 kilograms of heroin, Pacelli and Lipski, in the apartment. They seal them in half kilo bags. Lipsky, carrying the bag, goes downstairs. Pacelli is driving by in a car. All this minute detail, it is incredible that someone could sit here and make all of this up.

Pacelli is going by, sees a man. He points to Lipsky, he drives by, comes around again, and Lipsky gets in the car.

In the club, Pacelli gives the key to Catino, the same red Chevy. There is another deal with the red Chevy. This time Lipsky goes alone to 1420 Third Avenue, mixes up 2 kilograms of heroin, gives the car keys and registration to Pacelli, who goes over to Catino.

There is no testimony there that Mr. Catino observed Mr. Pacelli give the keys to Catino. That is a minor, insignificant point that Mr. Lipsky, if he was adding things, and he was making this all up, could have very well added.

During the summer months of 1971, there was surveillance in the barbershop by officers of the Police Department. That is when they take these pictures here,

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and the pictures in Government's Exhibit 60. These are just blowups of pictures in Government's Exhibit 60.

The pictures in Exhibit 60 were taken in 1971, and there is Pacelli of course, Mileto, Herbie Sperling, and Sonny Goldstein.

On the same day, July 16, 1971, Mr. Mallah and Mr. Sperling are in front of the barbershop standing next to the pole. On the same day, Mr. Mileto was in front of the barbershop and Mr. Sperling is getting into a Cadillac in front of the barbershop.

There is Mr. Mallah in front of the barbershop and Mr. Goldstein is there. Mr. Pacelli is there in front of the barbershop.

On August 2, 1971 there are a lot of pictures of Mr. Mallah in front of the barbershop walking up and down taking bets. In the fall of 1971, as you heard Miss Weyl testify, she wants to make some money, so she gets Mr. Pacelli to have Barry Lipsky move the stash to her apartment in 9th Street. They come up there with packages, and they are mixing on occasion, and they are testing on occasion.

What is Susan Weyl's motive to lie here? They try to ascribe something to her. Some of the motives they try to ascribe are the fact that Miss Weyl was living with

Mr. Lipsky, and they were lovers, and I suppose you are to infer they are out to protect each other.

"Q Isn't it a fact, Miss Weyl, there was a man called and identified as Mr. Lipsky's probation officer?

"A No, I don't recall that.

"Q Do you deny that that happened?

"A I said to him, my recollection, I don't recall."

You heard yesterday the probation officer who came in here, who is in no one's pay. He testified, he said, "I never called that apartment."

What else was there? A girl that came on here yesterday and testified that in her circle Susan Weyl has a reputation for being a sneak and a liar, and Susan Weyl told her that Lipsky and she were living together, and they were in love. Do you recall I showed her this picture, which is a group wedding picture, Government's Exhibit 7. I asked her, "Could you identify any of the people in here?"

She said, "Oh, yes, oh, yes, that is Vincent Pacelli and Bruce Gordon."

I kept giving it to her. She kept looking, she couldn't identify anybody else. Mr. Lipsky is standing here in the corner.

The two people she identified were Mr. Pacelli and

Mr. Gordon. Mr. Pacelli she said she had known for three or four years. Mr. Gordon, there is a picture of him here, Government's Exhibit 64. Bruce Gordon is in the front of Ballantine's Barbershop, and along with him in the immediate proximity is Mr. Sperling and Mr. Goldstein, and Mr. Barrett is against the pole, and there is Mr. Sperling with his arm on Bruce Gordon's shoulder.

These are the people that think very little of Miss Weyl, the people that hang out with Mr. Sperling down at the barbershop and with Mr. Pacelli. Of course they do.

In the latter part of 1971 Lipsky returns to the club where he is introduced to the defendant De Franco, and there ae two deals involving a white Cadillac this time. That is just because Lipsky likes to change the color of things. This time Mr. De Franco is the one that usually hands him the keys in the latter part of 1971. De Franco hands the keys directly to Lipsky, tells him where the white Cadillac is, and Lipsky goes to Susan Weyl's apartment this time, where the stash is, picks up half a key of cocaine, drives the car to First Avenue between 90th and 91st Street. He changed something. He didn't drive back to the club this time. He parked on 90th and 91st Street, takes a cab to the club, goes inside.

He couldn't remember whether he gave the keys to

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De Franco or he gave them to Pacelli and he saw Pacelli give them to De Franco.

That night he goes back to the club after Pacelli in his presence, in front of Mr. De Franco, arranges the payment of $5,500.

He testifies he goes upstairs, inside the first floor apartment, which he described to you -- I can't remember whether it was the right or the left -- as De Franco told him. It was Mr. De Franco and Mr. Fazzalari counting money.

They gave the money to him. They said, "Why don't you run it down?"

He counted it, $5,500, took the money, and he exchanged it from small bills, which it was, into good money, hundreds and fifties.

In November or December of 1971, De Franco again gives the case to Lipsky in the club. Again Lipsky goes to Susan Weyl's apartment where the stash is, mixes up a key of cocaine, drives back to the club, gives the key to De Franco and leaves.

This is incredible; this is incredible. When I told you this was a massive conspiracy to distribute heroin and cocaine.

In November of 1971 there is another transaction

this time involving a Pontiac Riviera or a Buick Riviera or Pontiac. Again Lipsky gets the keys in the club from Catino from Pacelli who got them from Catino, and he drives down to Susan Weyl's apartment. It's a key of coke this time. Lipsky also testified that he tested all the heroin, mostly all the heroin. He testified that sometimes it was a good source and he wouldn't test it as thoroughly as they would test it from someone who wasn't a good source.

If it wasn't a good source, they would give it the thermometer test, the boiling oil. If it was a good source, they would just do the acid test.

Anyway, was random sampling.

Probably one of the most interesting transactions, which I think highlights everything else in these transactions, is the transaction of October 1971. Pacelli and Lipsky are in a cafe on the east side, Yellowfingers. You have heard that name. Pacelli meets there with Nicholas Lugo. Pacelli comes outside, tells Lipsky to go to 1420 Third Avenue, mix up half a kilogram of cocaine, put it in the car, drive it to 106th Street, and give it to Nicholas Lugo.

Lipsky does as he is told, goes up, gives the keys to Lugo.

Shortly after that, Pacelli complains that

Lugo is dealing with people he doesn't trust. Now, you have been told that Lipsky found this out so he tailored his story to fit that. Only there is one thing. When Agent Salvemini arrests Lugo on the 19th of January 1972, Lipsky testified that he was in the Autopub that night, not knowing about the arrest. He walked in, Pacelli told him there was aphone call, and Nicholas Lugo has been arrested, and that he has to go take Cheryl Lugo down to see about getting Nick Lugo out, a friend of the family.

Nothing wrong with that, only it certainly corroborates Mr. Lipsky, doesn't it, because the bail bondsman, Mr. Bertolino came in here, identified Mr. Pacelli, identified him as the one who came down with Cheryl Lugo that time to put up bail.

Did Mr. Lipsky make that up, ladies and gentlemen? Was this a figment of his imagination?

In addition to these Catino transactions and De Franco transactions in late 1971, November and December, Pacelli and Lipsky go to the barbershop, park a block away this time because it's hot.

Pacelli leaves, comes back. There is a gray Thunderbird with a black top which he tells Lipsky is parked in a garage. He tells him there is two kilos of heroin in the trunk.

Lipsky goes to the car, which is parked in the garage, takes the keys, drives the car down to the stash, puts the stash in Susan Weyl's apartment, four-1/2 kilogram bags.

He drives back, drives the Thunderbird back in the garage, goes to the barbershop. Pacelli is outside again talking to Mr. Mallah and Mr. Sperling, and Mr. Mallah testified he had never seen Mr. Pacelli until the pretrial conference here. Mr. Lipsky is making all this up.

He is not making up conversations, but he is making up seeing Mr. Mallah talking to Sperling and Pacelli.

After this transaction, Mr. Pacelli goes down with Lipsky to Spring Street with $20,000 which Pacelli takes upstairs, evidently to give to Sperling. Lipsky doesn't know because he didn't go upstairs. His function is to stay downstairs. He doesn't meet the people.

There is another transaction prior to Christmas 1971.

There is also a transaction involving Juan Serrano also known as Juan Negron.

This is a picture of Mr. Pacelli and Mr. Negron and Benny Fabre. This picture was identified by Mr. Lipsky.

This transaction takes place in the Bronx, in Shakespeare Avenue. There are two transactions. One

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eventually ends up down in the barbershop.

In 1971 Lipsky is instructed by Pacelli to go into a bank and buy two savings bonds for Sperling's kids, Nick Sperling and Gus Sperling. Remember the bank teller who came in here and testified. She identified a picture of Lipsky. She remembered this because Sperling meant little bird, and she remembered selling these to Mr. Lipsky.

Either Mr. Lipsky was giving Mr. Sperling presents or Pacelli was giving Sperling presents. What difference does it make? It made a lot of difference. First of all, it showed that Mr. Pacelli knew Mr. Sperling. It showed that Mr. Lipsky might have known Mr. Sperling, though Mr. Lipsky says he didn't know Mr. Sperling, never met him, had seen him a lot. Is he lying about that?

Lipsky also testified about changing bad money to good money. The teller came in, Gertrude Keenan, and identified Lipsky as the person that changed on occasions, as she can recall, amounts of up to $2,000 from 20s and 10s to hundreds and fifties.

Again, just before Christmas in 1971 Cecile Mileto was down ih Spring Street, and Sperling and Mallah are sitting themselves at a kitchen table. Sperling is counting money, tells Mallah -- this is Cecile Mileto's testimony -- "$75,000 is not too bad a haul."

She sat here and told you that Mallah didn't say anything. If she was lying why couldn't she add a little bit? But she wasn't.

Mr. La Rossa went through a long dissertation about Mrs. Mileto's past history. Why did he find all that out? He found out from Mrs. Mileto, from that stand. I would just like to read you some of the questions and some of the answers:

"Q Tell me, Mrs. Mileto, were there periods within the last few years that you really have no recollection of because of drugs?

"A Yes, there are a few.

"Q In fact, there are times that just are a blur to you at this time as you look back?

"A No, I have had blackouts and passed out, things like that, many times.

"Q OD, what does that mean?

"A Overdose.

"Q You have also attempted to take your life, haven't you?

"A Yes, sir, I have."

This one about delivering the money to the cops, $7,000, this bribe money:

"Q And then you got out of the car after driving to

New York and passed out on the street, right?

"A Not yet, crawled across the street."

That is Mrs. Mileto's answer. This is the woman that is coming in here lying. Does that sound like the testimony of a person who is lying, who is hiding anything? You have seen her on the stand. You be the judge.

Another thing about her habit, "Q All the drugs that you told us about that you took over the years, you did so without a habit?

"A No, I didn't say that. I did have a habit, a very bad habit at one time.

"Q How many bags a day did it grow to?

"A $85 a day.

"Q And you had to earn that $85 a day by illegal means; is that right?

"A Yes."

Does that sound like the testimony of a person who is coming in here lying, who is hiding things? A person who said she didn't even want to be here and testify.

Reginald Williams, what is Reginald Williams' big interest in this case? Is he getting paid?

No, he is not getting paid. He is one of the ones who is here because he is going to cooperate, and that is

going to be brought to the attention of the Judge who sentences him, so he has a motive to lie, everybody has a motive to lie.

He testified he met Sperling in 1971 down the barbershop, and on a few occasions had the transactions involving him, Louis Mileto, out in Queens, Barney Barrett inside the men's room of the Gold Rail Lounge, where he receives half a key of heroin which he injects into his arm, goes back uptown and sells it.

MR. MITCHELL: Your Honor, I am going to object.

THE COURT: What are you objecting to?

MR. MITCHELL: The testimony. It's not in the evidence.

THE COURT: If it is not in the evidence, the jury will disregard it.

MR. LAVIN: Mileto, during the late part of 1971, September, October, November, was storing the narcotics in Zelma Vance's apartment, the one who testified here. He was making deliveries from the apartment, making pick-ups.

In February, as Special Agent Pope is negotiating with a Mark Reiter, another name, for a purchase of heroin, a kilogram of heroin for $30,000, surveillance observes Reiter meet with Mileto.

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Eventually, on February 10th there is a sale. Special Agent Pope buys a kilogram of heroin for $30,000.

At the same time Agent Stromfeld arrests Louis Mileto, who is hiding in the seat of a car. He calls up Zelma Vance. She testified, "That is what he told me, he was hiding in a car and some cowboy arrested him."

Meanwhile that night, Conforti is in the apartment, he is worried because Mileto has been arrested. He doesn't know it. He calls up Herbie Sperling, and he is told to take all the stuff out of the apartment.

He takes all the junk out of the apartment, goes downtown to Sonny Goldstein, gives him the junk, goes home.

Next day Herbie Sperling calls him up, "Get that mix and stuff and equipment out of the apartment."

He goes back up and takes that out. Louis Mileto gets out on bail, comes to Joey Conforti's house, and he is very upset. He is upset because there has been some extra junk in the apartment. He has been holding out.

They go down to Spring Street. Inside Spring Street, as Conforti arrives later, Mileto, Benny Mallah again, and Sperling are arguing. It's mostly Sperling and Louis. Sperling is chewing out Louis for holding out on him, for stealing from him. Mallah and Conforti overhear it.

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It's after this time that Conforti begins working directly for Sperling, begins mixing in motels in Long Island and New York, the Skyline Motor Inn, the apartment on 54th Street, and these motels, the Bar Harbor and the Gateway.

Two of those motels are swept after Mr. Conforti's arrest, and they turn up traces of heroin, as does Mr. Lipsky's apartment.

Conforti testified he mixed two, two and a half kilos of heroin for people such as Jack Spada and Schworek, Sonny Goldstein, and this stuff is picked up from Sperling and delivered back to them by one of Goldstein or Schworek. It's mostly Conforti's job just to stay there and mix the heroin.

In 1972, surveillance again in the barbershop is picked up. These photographs are all of the surveillance. You heard Patrolman Lino and Sergeant De Luca testify about a conversation that he overheard while he was secreted in the trunk of this automobile.

You have been told that is so incredible that a man who is inside that trunk could hear that, and frankly you were even told that Lino made it up, that he lied about it, there is no such conversation.

Look, here is the car, here is Mr. Mallah,

here is Mr. Sperling (indicating). This is living proof. There they are outside, standing by the pole. There is no doubt about that. Mr. Mallah identified those and other people identified those.

Is there any doubt about the car? Here is a little picture. Here is Sergeant De Luca parking the car, a picture of parking the car on another occasion in front of the barbershop.

In that conversation, a gambling conversation, Herbie Sperling, "I got to have stuff."

Mr. Mallah, "Don't worry about it. I will see the people later on."

Sperling, "50 thou, right?"

Benny: "Yeah, right, 50, 50."

Herbie: "But I got to have it by tomorrow."

Benny: "Don't worry about it. I am going to see the people later this afternoon, tonight, or tomorrow. Don't worry about it."

Herbie: "I need the stuff. I got to have the stuff."

Mallah: "Don't worry about it. I will have it. If the people are straight, if they are not on the run, I will get it."

That never took place, ladies and gentlemen, it's just made up? It's made up to fit the testimony of all the

other people who saw Mr. Mallah talk about receiving money, transferring money, being in the presence of narcotics when it's being delivered?

MR. LA ROSSA: Objection.

MR. LAVIN: Mr. Catino is arrested --

THE COURT: If the objection relates to whether or not this is in the evidence, I will remind the jury of what I said so many times before, that the evidence is that which they recall which was given from the witness stand.

MR. LAVIN: Conforti is arrested on April 13th. In the trunk of the car he's got everything, the heat sealers, everything he used to mix narcotics, strainers, scales, sealers. He has all this lactose which he used and manita, which he used to mix narcotics. He also has a centigrade thermometer.

Mr. Catino is also arrested, and he is arrested with eight thermometers. They are all Fahrenheit thermometers. There has been testimony that they won't go up to the scale that a centigrade thermometer would go up to.

The government didn't put these in Mr. Catino's hand. He had them. They didn't ask him to carry them. He had them. What would a man who is not a chemist know about Fahrenheit and centigrade thermometers? Maybe he bought them by mistake, ladies and gentlemen. You heard the

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chemist who testified here yesterday. I asked him what these are used for.

I said, "Were they chemical thermometers?"

He said no. What could they be used for? He said, "Well, they could be used in biology, physics," and he said, "You can put them in your refrigerator." Are you going to put that in your refrigerator? For what?

He has eight of them, ladies and gentlemen. He is arrested with eight of them. Maybe he has eight refrigerators.

On April 13, 1973 an indictment is filed in this courthouse, 73 Criminal 330. It charges Benjamin Mallah, Herbert Sperling, Joseph Conforti and others with conspiring to violate the federal narcotics laws. On a docket entry it shows that the indictment was filed April 13th, and a bench warrant issued. A bench warrant was issued the same day. That is for Mr. Mallah's arrest. Mr. Mallah is not in New York. He is down in Florida.

On April 15th he goes downstairs, comes upstairs and tells Nancy O'Malley, "I have got trouble," and he leaves. He packs his bags and leaves.

He told us that is because there was a bookmaking warrant for him in Florida. It's two days after he is indicted for conspiracy in New York to violate the narcotics

laws. He testified that he made phone calls to New York on or about April 16th, talked to the Stage. He believes he talked to Mr. or Mrs. Goldstein, that is, Sonny Goldstein, Sonny Gold, who also was indicted in the same count.

MR. LA ROSSA: Objection.

MR.LAVIN: It's in evidence.

THE COURT: The objection is overruled.

MR. LAVIN: But yet he doesn't know he is indicted. Mr. Sperling is indicted. All the people that he has been associated with down at Ballantine's Barbershop, Mr. Sperling, Mr. Goldstein, and others are indicted, but he doesn't know anything about it until he comes back to New York and he is arrested, and he is arrested in his apartment.

In his apartment he has a lease in the name of Morris Geller; he has bills in the name of Morris Geller, which he pays cash for. He has a Master Charge application in the name of Morris Geller, and he has an identification card in the name of Morris Geller with a bankbook. On the identification card he is wearing a toupe and he is wearing a mustache.

He told you he did all this because he couldn't get credit. He didn't want to establish credit.

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Ladies and gentlemen, that story is incredible. The reason Mr. Mallah, we submit, changed his identity was because he knew he was wanted. He knew there was a warrant out for his arrest since April, and he was afraid he was going to be caught.

At the same time he is arrested he has approximately $8,552. $7,300 of that is in hundred dollar bills. He has that on him. This is the man that owes judgments to Household Finance. He happens to have $8,500 on him.

He also has identification in the name of David Barton, identification which he denied at the time of his arrest ever using; but he went through an elaborate story up here on the stand telling you he did use it down in Florida.

He also told you that the agents stole the money from him. That is the best game in the world today --

MR. LA ROSSA: Objection.

THE COURT: That is argument. The jury will draw its own inferences from the testimony as given.

MR. LAVIN: That is the greatest game in the world today, ladies and gentlemen, blame it on the government, blame it on the government.

He says he had $9,700, he can't understand what

happened to it. He signed a receipt for $8,500. The agent testified that Mr. Mallah counted the $8,500 in front of him, never said a word.

He testified, "I didn't say a word, I didn't say a word on my arrest. I didn't say a word when I filled this out. I told my lawyer about it."

Just another little piece of blame it on the government.

Let's see what Mr. Mallah testified to on the stand, what he did.

He went to the barbershop often in 1971 and 1972, never met Louis Mileto, never knew Cecile Mileto, never was at 5 Spring Street. He knew Herbert Sperling well, went out with him occasionally socially, never was at his apartment at 5 Spring Street.

Stupid, stupid question, "Did you ever give furniture to the Miletos?"

No. He was a bookmaker.

"Did you ever have a conversation?" Never had that conversation with Sperling in front of the barbershop. It was all made up. He never used the word 50 thou. Sperling never gave him $75,000 in an attache case. He never got $60,000 in a package up at 5 Spring Street because he was never up in 5 Spring Street. He didn't know

Spada.

So what happened this morning, ladies and gentlemen? Sergeant DeLuca gets on the stand -- it's not very important at the time but it becomes important -- and Sergeant De Luca says in 1971 he was tailing Benjamin Mallah down from the barbershop, and he saw him meet with Louis Mileto. Big deal; it's not important at the time. He met with Louis Mileto.

It becomes important only when Mr. Mallah takes the stand and denies knowing him. This is the man that is delivering narcotics for Sperling, and he denies knowing him.

Why did he deny knowing him? Because that would implicate him. And the 15-year old boy that took the stand this morning, and the motives were implied to him. He got on the stand and all he said was, "Yes, I went to Mr. Mallah's house and I picked up a couch with my old man. I seen him down in 5 Spring Street. I seen him in the barbershop talking to Louis Mileto."

If he is lying, who is paying him to lie? Every witness who has testified in this case has had motives ascribed to them. Either they are getting paid by the government or they are stealing money from the government or they are lying to protect themselves. Mr. Lipsky is

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lying, the whole testimony is an incredible amount of lies. Where are they getting all the information they are using against Lipsky? You heard it first right from his mouth.

I just ask you, when you go into the jury room, I think the Judge is going to charge you Monday, so there is going to be a lot of time. Just have the testimony reread. Just try and take into consideration what Mr. Lipsky has done, what he has done, but remember the way he testified on the stand, and remember what he testified to.

Remember, was he hiding anything? Did he, like Mr. Mallah, get on the stand and deny knowing people? Was any of his testimony contradicted on the stand? It was not.

We also heard about the perjury here, Mr. Lipsky's perjury. Mr. Lipsky told you on the stand, he said, "Yes, when I was asked about my cooperation on two previous trials, I said I didn't get any promises, and that was incorrect."

Consider that. Consider everything you have heard about Mr. Lipsky, but also remember what he testified to, how he testified, and his demeanor on the stand.

Ladies and gentlemen, as I told you from the outset, there has been so much evidence in this case, no one piece establishes this conspiracy. It has been pieces, pieces of

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evidence like rent receipts, like telephone bills, like photographs, that don't mean anything by themselves. There is no crime in standing in front of a barbershop. Mr. Mallah and Mr. Goldstein are having a conversation. He is probably taking a $5 bet. Here is the man with $8500, and he is taking a $5 bet from the man who almost fainted when he was asked about 50.

There is nothing wrong with that. There is an officer inside there, and he heard a conversation, and he related to you what he heard. If you think he is lying, and you think the rest of the people have lied, you have a duty to this country to get up, go into the jury room, and walk home on Monday when the judge finishes the charge. If you think the government has paid anybody off here to come in and lie on that stand, go home.

Thank you very much.

THE COURT: Ladies and gentlemen, we have come to the end of a long day. I will ask you again, as I asked you before, and now with particular emphasis because we are coming to the closing hours of the trial, we have an intervening weekend. It would be wrong for me to ask you to give up your Saturday and Sunday rest days to come in and finish this case.

I will ask you to come in on Monday, but in the

meantime I am asking you to keep an open mind on this case, not to discuss it among yourselves; and the reason for keeping an open mind on this case is that it is incumbent upon me to tell you what the rules of law are, as I see them, that apply to this case.

It is on the basis of those rules of law and your resolution of the facts, a function in which you are supreme, which cannot be invaded by anybody but the jury, to resolve the facts, that you will consider a verdict.

Don't let anything or anybody mar the fairness and impartiality of this trial. Avoid any contact with any papers, magazines, radios, television, that have anything at all to do with any allied subject, allied matters, similar matters, anything that has anything to do with this area, until after you have finished your deliberations.

In that way we will all be assured that you will have complied with the oath that you took when you came to court and were impanelled as a jury and swore that you would well and truly try this case.

I want to bid you good afternoon and hope you all have a restful weekend. We will see you all back on Monday morning at 10 o'clock.

We stand in recess until Monday.

(Adjourned to Monday, January 7, 1974, at 10 a.m.)

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UNITED STATES OF AMERICA

v 73 Cr 881

BENJAMIN MALLAH, et al.

New York, January 7, 1974
10:00 a.m.

- - -

CHARGE TO THE JURY

Hon. Milton Pollack

Ladies and gentlemen of the jury:

We have now reached the concluding phase of the trial. I want to express to you the thanks of the Court for your faithful attendance, patience, and close attention to the case.

You have now heard and received all the evidence on which the case is to be decided. Through the arguments of the respective counsel, you have learned the conclusions which each party believes should be drawn from the evidence presented to you.

I shall outline the principles of law which will be your guide in your deliberations. It is your duty to accept these instructions on the law as they are given to you by me, whether you agree with them or not.

On the other hand, it is your exclusive function

to determine the facts on the basis of your consideration of the evidence. As exclusive judges of the facts, your decision thereon is final and conclusive. Applying my instructions on the law to the facts as you find them, you will decide whether the defendant on trial before you is guilty or not guilty of the charges made against him or any of them.

The indictment in this case named thirteen persons as defendants and an additional number as co-conspirators but not defendants. Only five, Benjamin Mallah, Vincent Pacelli, Jr., Alfred Catino, Alfred DeFranco, and Barney Barrett, are on trial before you. They are the only persons as to whom you will render a verdict, and as has been mentioned during the trial, Joseph Conforti and Susan Weyl, named herein as co-conspirators allegedly have previously pleaded guilty.

The jury must not consider the guilty pleas as evidence against the defendants before you now, nor may any adverse or favorable inference be drawn therefrom against or for the defendants who are on trial.

During the course of the trial there was evidence indicating that others than the defendants now on trial were allegedly involved in one way or another with the activities which are the subject of the indictment. I charge you that

the fact that some other people allegedly involved were not brought before you because they were not indicted but were named as co-conspirators, or if indicted as defendants are not now on trial before you, is to play no role in your deliberations. No inference, favorable or unfavorable to either side or to any individual defendant, may be drawn from the fact that other people are not on trial before you. It must not affect your deliberations in any way with respect to whether a defendant who is on trial is guilty or not guilty of the offenses charged against him.

Six counts or charges of the indictment will be submitted for your verdict. Each count charges the person or persons named therein with a separate offense or crime. Each must be considered separately, and each defendant must be separately considered.

In substance, the first count charges all five defendants who are before you with willfully and knowingly conspiring amongst themselves and with others to violate the federal narcotics laws by distributing or possessing with intent to distribute heroin or cocaine.

The second, third, fifth, sixth and seventh counts -- you will notice that I omitted Count 4; that is not before you.-- those counts that I have mentioned charge the persons named therein with actually distributing or

possessing with intent to distribute heroin or cocaine, as the case may be.

These counts are referred to as substantive counts to distinguish them from the conspiracy count, because unlike the conspiracy charge, which is a charge of plotting, scheming, agreeing to commit offenses, the substantive counts are based on alleged actual commission, carrying out of such alleged offenses.

I shall first mention certain general principles of law which apply to this as well as to every jury trial of a criminal case. The criminal case is initiated when a grand jury issues an accusation against the defendants it names. It is not the function of a grand jury to determine guilt or innocence. That is the function of a trial jury like yourselves.

The indictment so filed is not to be taken by the trial jury as any evidence whatsoever on the charges made therein. It is not evidence that the crime was committed.

When the five defendants came before the Court in response to the indictment, each pleaded not guilty to the charges against him. Under our system of law, a defendant is presumed to be innocent and he carries that presumption throughout the trial and until the jury is persuaded the Government has proved the defendant's guilt beyond a

reasonable doubt, a term that I will explain to you in a few moments.

Under the law, a defendant does not have to prove his or her innocence or submit any evidence at all. The presumption of innocence is a conclusion drawn by the law in favor of the citizen by virtue of which he must be acquitted of a criminal charge unless he is proven to be guilty beyond a reasonable doubt. In other words, this presumption is an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof the law has created.

The evidence that has been admitted is the only source from which the facts are to be found and from which factual inferences are to be drawn. You will recall that on occasion questions have been asked, some carrying implications, but objections were sustained blocking answers to the questions.

At times, answers were given to questions and the answers were ordered stricken from the record. Such unanswered questions and innuendo therefrom, and stricken answers must be disregarded. They are not evidence in the case.

The form of an unanswered question and any

atmosphere or innuendo suggested by it are to be ignored. They are not evidence in the case.

Courtroom exclamations off the witness stand are not evidence in the case, nor are apologies evidence in a case.

As I have repeatedly said to you, what has been said in your hearing by any person other than a witness, or said or exclaimed by the lawyers for either side or even by the Court heretofore, or in this charge in relation to the facts, is not evidence.

Your memory of the evidence is what must govern you in the determination of the case. Counsel have given you their viewpoints. I shall refer to some of the evidence. However, it is your recollection of the evidence and your judgment of the facts that controls. It is for you to determine the weight that will be given to the evidence, the credibility that you will extend to the witnesses who testified, and the reasonable inferences that are to be drawn from the evidence that has been received.

The jury must decide this case solely on the evidence presented here in the courtroom. You must completely disregard and suppress television and radio reports or [illegible] which you may have read, seen, or heard, if any. Such reports and [illegible] are not evidence. Therefore,

you should not be influenced in any manner whatsoever by such media or publicity or any others, if any there were.

There are two kinds of evidence recognized and admitted in courts of justice, on either one of which you may find an accused guilty of a crime. One is called direct evidence and the other is called circumstantial evidence.

Direct evidence is evidence which frequently is adduced by testimony of an eye witness or a participant, and tends to show a fact in issue without need for any other amplification. Of course, there is always a question of whether it is to be belived.

Circumstantial evidence, on the other hand, is indirect. It is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. There must, however, be positive proof of some fact which affords a basis, a starting point from which a reasonable inference may be drawn of the fact to be inferred.

Circumstantial evidence is that evidence which tends to prove a fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true.

Let me give you an example to illustrate just what I have said. Suppose when you came into the building this morning the sun was shining brightly outside, and you came

into this courtroom, and suppose you found the blinds were drawn so that you could not see what the weather was like during the rest of the day. As you were sitting here during the course of the day, in walked a man with an umbrella dripping and with a raincoat dripping. You haven't seen any rain outside, but from the circumstances of the man walking in with a dripping umbrella and a dripping raincoat, it is reasonable for you to infer the further fact that it is raining outside, although you can't see it.

That is what circumstantial evidence is. It consists of facts proved from which the jury may infer by a process of reasoning other facts in issue.

It is not necessary that the participation of a defendant be shown by direct evidence. Connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference.

In this case, each side has produced both direct and indirect or circumstantial evidence. The Government contends that its evidence establishes each defendant's guilt on each charge. Each defendant contends that no evidence has overcome the presumption of innocence, and that at the least there is a reasonable doubt of his guilt.

You apply to all the evidence the same standard of proof. It must satisfy you of the guilt of the defendant

beyond a reasonable doubt on every essential element of the offense being considered, or else you must acquit the defendant of that offense.

However, the Government is not required to prove guilt beyond every possible doubt, nor to an absolute certainty. Such a measure of proof is usually impossible. By reasonable doubt we don't mean just any old doubt. By reasonable doubt we mean a doubt which is sufficient to cause a prudent persmn to hesitate to act in a matter of importance to himself or herself.

If the evidence which you believe is such as would induce a prudent person to act without hesitation in a matter of importance to himself or herself, then you may say you have been convinced beyond a reasonable doubt.

If, on the other hand, your mind is wavering or uncertain to the point where you have a doubt that would cause a prudent person to hesitate in a matter of importance to him or her, then you have not been convinced beyond a reasonable doubt.

Speculative notions or possibilities resting upon mere conjecture not arising or deducible from the proof should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel or by your own ingenuity, not legitimately warranted by the evidence or the

want of it, or one born of a merciful inclination to permit a defendant to escape the penalty of law, or one prompted by sympathy for him or those connected with him, is not what is meant by reasonable doubt.

Reasonable doubt, as that term is employed in the administration of the criminal law, is an honest substantial misgiving generated by the proof or want of it. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused.

If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life you may be said to be free from any reasonable doubt and should find a verdict in accordance with that conviction or belief.

In the determination of whether a defendant is guilty or not guilty, you must bear in mind that guilt is personal. Whether a particular defendant is guilty or not must be determined by the jury beyond a reasonable doubt solely by the evidence introduced by the particular defendant or the lack thereof and from the reasonable inferences that may flow from the circumstantial evidence and the direct

evidence, and that determination must be made by the evidence relating to the particular defendant and not anything else.

You must make your own evaluation of the evidence, including the testimony given by each of the witnesses, and determine the degree of weight you choose to give to such evidence. It is for you to determine from the evidence and demeanor on the stand of a witness, particularly on material matter related to those charges, whether or not he or she has given truthful, reliable testimony, or unintentionally or otherwise embroidered the truth, falsified, exaggerated, or suppressed material facts and thus given an unreliable story.

In evaluating the testimony, you may consider the interest or lack of interest of any witness in the outcome of the case,the bias or prejudice of the witness, if you find that he or she had one, the appearance, the manner in which the witness gave his or her testimony on the stand, the opportunity that the witness had to observe and note the facts concerning which he or she testified, the probability or improbability of the witness' testimony when viewed in the light of all the evidence in the case.

Those are all items to be taken into consideration in determining the weight, if any, that you will assign to that witness' testimony.

Evidence that any witness has been convicted in

the past of a felony may be considered in determining his or her credibility, meaning worthiness of belief. Such evidence is presented solely to aid you in considering their believability. A previous conviction will not decide this for you in and of itself. The conviction of a felony does not make a person necessarily unworthy of belief, but it will be one of the facts which will help you decide whether to believe him or her and how far.

The testimony of a witness may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood or because the witness did not accurately see or hear that about which the witness testified, or because his recollection of the event is false or even because the witness has not expressed himself or herself clearly in giving the testimony.

You are also entitled to consider the possibility that where a witness is called upon to testify long after the event and at great length, inconsistencies may be the result of an innocent mistake or lapse of memory rather than of deliberate intention to falsify or change the facts. In short, it is not unusual for a witness in a lengthy proceeding to utter inconsistencies at some stage along the line.

If your consideration of the evidence makes it appear that there were differing versions of the facts

resulting in a discrepancy in the evidence, you will have to consider whether or not the apparent discrepancy is a result of understandable error which can be reconciled by fitting the two stories together in a rational relationship.

If, however, you believe that that is not appropriate or possible, you then have to determine which of the conflicting versions you will accept. You may, if you wish, accept so much of the testimony of a witness as you may deem true and disregard what you feel is faulty or mistaken or unclear. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve testimony in whole or only in part, even though it is not otherwise impeached or contradicted.

If you find that any witness has willfully testified falsely as to any fact material to the case that you are considering, the law permits you to disregard completely the entire testimony of that witness on the principle that one who testifies falsely about one material fact is quite likely to testify falsely about everything. However, here again, you are not required to consider such a witness as totally unworthy of belief. A witness who has given false testimony may also have given credible evidence. You may, if you wish, accept so much of his or her testimony as you believe true and reliable, and disregard what you feel is

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false or unworthy of acceptance.

Some of the Government's witnesses testified that they were participants in the acts charged in the indictment. The Government must frequently use testimony of alleged participants to bring out the alleged facts. Otherwise, it would be difficult or impossible to detect or prosecute alleged wrongdoers. Such witnesses are sometimes referred to as accomplices. An accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent.

Barry Lipsky, Susan Weyl, Joseph Conforti, and Reginald Williams are alleged accomplices in this case. An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important stake in the outcome of a trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicity promised him in return for his plea of guilty and his testimony. Such testimony is always to be received with caution and weighed with great care.

Of course, I am not saying that because a person is an alleged accomplice, he or she is not to be believed. An accomplice does not become incompetent as a witness

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because of a participation in the crime charged. On the contrary, the law in the federal courts is that the testimony of an accomplice alone, if believed by the jury, may sustain a verdict of guilty by the jury even though not corroborated or supported by other evidence. It is for the jury to determine whether and to what extent such testimony is to be credited.

Similarly, all the testimony of witnesses or of any defendant who admitted to previous perjury or fabrication should be considered with caution and weighed with great care. Again, such a witness may be believed in part or in whole. It is for the jury to determine whether and to what extent testimony from such a source is to be credited.

Four of the defendants did not testify on their own behalf, and our law says a defendant may or may not take the stand. The fact that a defendant did not testify cannot be considered by you as any evidence against him or form a basis for any presumption or inference unfavorable to him. You must not permit such fact to weigh in the slightest degree against such a defendant nor should it enter into your discussions or deliberations. A defendant is not required under our law to establish his innocence.

On the other hand, the defendant Benjamin Mallah took the stand. His credibility is therefore to be evaluated.

In appraising a defendant's credibility who has testified, you may take his or her interest in the outcome into consideration. Obviously, he has a deep personal interest in the result of this prosecution. Indeed, it is fair to say that a defendant has the greatest stake in the outcome of the trial. Interest, as you know, creates a motive for testifying falsely. The greater the interest, the stronger the motive and the defendant's interest in the result of a trial is greater than that possessed by any other witness. However, it by no means follows that simply because a person has a vital interest in the end result that he or she is not capable of telling a truthful story. It is for you to decide to what extent, if any at all, his interest has colored or shaded the testimony.

As in the case of any other witness, a defendant's criminal record, if any, may be considered, along with all the other facts and circumstances in the case, in evaluating his testimony, his believability, and in determining the weight to be assigned to it.

However, evidence of a defendant's previous conviction of a felony is to be considered by the jury only insofar as it may affect the credibility of the defendant as a witness and must never be considered as evidence of guilt of the crime for which the defendant is on trial.

If you find beyond a reasonable doubt that a defendant fled or concealed himself and disguised his appearance immediately after it was discovered that a crime had been committed, in order to avoid subsequent identification and apprehension by law enforcement officers who might be seeking him in connection with his conduct, that fact may be considered as evidence of guilty consciousness pertaining to the charges against him only relevant to the issue of knowledge and intent.

Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance, if any, to be attached to such circumstances, are matters for your determination. The flight or concealment of a defendant does not create a presumption of guilt, but it is merely a fact to be considered by you together with all the other facts and circumstances in determining the guilt or innocence of that defendant.

Similarly, if you find beyond a reasonable doubt that a defendant adopted a name other than his own in order to avoid subsequent identification by law enforcement officers who might be seeking him in connection with his conduct, that would be a fact in connection with the charge against him only from which you may, but you need not, infer a consciousness of guilt on his part.

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There is no legal requirement that a person should change his name in court. A person may use any name so long as his purpose is not to defraud and deceive, or to secrete himself from or to throw off pursuit by the law if he has committed any offense.

In order to return a verdict on any count as to any defendant, each juror must agree on the particular finding as to the particular defendant. The finding must be unanimous. The form of your report will be whether you find the defendant guilty or not guilty of the particular charge that you are considering. I will give you a suitable form which names each defendant and identifies the counts in the indictment against that defendant that you are to consider,with appropriate columns for recording your vote.

Each defendant is entitled to have it determined whether he is guilty or not guilty as to each of the crimes charged, determined from his own conduct and from the evidence which applies to him as if he were being tried alone. So where you were instructed that particular evidence must be admitted only against one and not against all the defendants, you may consider such evidence only against the one.

Whether any one defendant is guilty or not guilty of any of the crimes charged should not influence your verdict respecting the other defendants. The jury may find

any one or more of the defendants guilty or not guilty on one or more counts.

Now, let us turn to the indictment and then to the statutes involved in the indictment.

Count 1 charges conspiracy to violate certain federal laws. The essence of the crime of conspiracy is the scheme or plot, understanding or agreement, to violate other laws. It makes no difference whether the scheme was successful or whether it failed of its purpose; it is still punishable as a crime. Consequently, on a narcotics conspiracy charge, there is no need to prove an actual violation of the narcotics laws. It is enough that there was a criminal plan.

The conspiracy statute, Section 371 of Title 18 of the United States Code provides in pertinent part as follows:

"If two or more persons conspire...to commit any offense against the United States..and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime."

I will now mention the offenses against the United States in the federal narcotics law which the defendants are with scheming to violate. The Comprehensive Drug Abuse Prevention Act of 1970 is a law which passed by Congress because of a concern with the illegal distribution of and possession with intent to distribute narcotic drugs which have a substantial

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and detrimental effect on the health and welfare of our people. The part of this act which is applicable to the charges here is called the Controlled Sustances Act which became effective on May 1, 1971.

The term "controlled substances" is used in the act to refer to any drug included in one of five schedules contained in the Controlled Substances Act. Heroin is included in Schedule i(b) and cocaine is included in Schedule ii(a). Among other things, the act makes it unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute any controlled substances such as heroin or cocaine. In addition, any person who conspires to commit any such offense commits a crime.

In order to prove the crime alleged in the first count, conspiracy, the Government must establish several elements beyond a reasonable doubt.

First the existence of the conspiracy alleged in the first count for a substantial part of the period alleged, and here the Government concedes that May 1, 1971 may be considered the earliest date of the existence of the conspiracy that is alleged, and it is charged that the conspiracy continued until September 20, 1973, when the indictment in this case was filed.

However, the Government is not required to prove

that the conspiracy began on a specific day or ended on a specific day. Proof that the conspiracy existed for a substantial portion of that period, even though it might be a relatively small part of that period, would be sufficient.

Second, the Government has to prove that it was part of the conspiracy to unlawfully violate the narcotics statute to which I have referred.

Third, the Government must prove that the defendant under consideration by you knowingly and willfully became a participant in the conspiracy.

Fourth, the Government must prove that at least one alleged co-conspirator knowingly committed at least one of the alleged overt acts in furtherance of the conspiracy during the period of its existence.

Now, we speak about overt acts. Under our laws, it is not sufficient to constitute a crime to agree mentally to an unlawful plot if no act occurs to carry out some part in the conspiracy. Such an act is called an overt act because it is an actual and open, not a concealed, act.

The overt acts claimed here are set forth in the indictment, and I will read them to you shortly.

If the Government has failed to establish each of the essential elements mentioned as to any defendant, you must acquit that defendant on the conspiracy charge. If, on

the other hand, it has established each such element beyond a reasonable doubt, you will find that defendant guilty.

What is conspiracy? It is simply a combination or agreement of two or more persons, or concerted acts by two or more persons, to accomplish a criminal or unlawful purpose. There have to be at least two people involved. You can't conspire with yourself. It is in essence a partnership in crime.

The gist of the offense is the combination or agreement to violate the law, in this case the offense charged was violation of the narcotics laws I mentioned, in furtherance of which an overt act was committed.

It is not necessary that a conspiracy be established by direct evidence in order to convict. In fact, it can rarely be proved in that fashion for the reason that people seldom sit down and sign agreements to engage in an unlawful scheme or activity, much less to have them notarized or made known to the public. That type of conduct would be extraordinary. Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding.

It is sufficient if two or more persons in any manner, impliedly or tacitly, come to a common understanding to violate the law. It is not necessary that the persons

charged sit down and enter into a formal agreement or that they state all the details of their agreement or scheme or how it is to be effectuated.

Conspiracy is generally a matter of inference to be drawn from the conduct of the persons charged. Actions may often speak louder than words, and a defendant's participation in a conspiracy may be inferred from such facts and circumstances in evidence as appear to you logically to support or sustain such an inference.

It is sufficient if it be shown beyond a reasonable doubt that the defendant and an alleged co-conspirator came to a mutual understanding to accomplish an unlawful act.

The Government in the indictment and in other pleadings alleges that the following persons, among others, although not named as defendants in the indictment, were members of the alleged conspiracy, that they were alleged co-conspirators in this case. Their names: Herbert Sperling, Joseph Cmnforti, Louis Mileto, Barry Lipsky, Norman Goldstein, Juan Serrano, Louis Valentine, Reginald Williams, Susan Weyl, Edward Peter Schworak, John Ramos, John Capra, Leo Guarino, Nicholas Lugo, Peter Aponte, Paul Carter, Mark Reiter, John Caruso.

To determine whether a conspiracy existed, you piece together the independent evidence relating to each

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alleged conspirator, and determine, looking at the whole picture, whether the acts, conduct, and statements of at least two of the alleged conspirators and the reasonable inferences to be drawn from such acts, conduct and statements, establish to your satisfaction beyond a reasonable doubt that there was a conspiracy.

If, for example, there was a concerted action among several persons with each of them doing something related to the act of the others, all of which contributed in the same or similar manner toward the accomplishment of some unlawful objective, such evidence would support the inference that those persons had conspired together to accomplish that unlawful purpose.

I call to your attention that an unlawful agreement may exist even though the individual alleged conspirators may have done some act in furtherance of a common unlawful purpose apart from and even unknown to the others.

A conspiracy once formed is presumed to continue until either its objective was accomplished or until there is some affirmative act of termination by its members.

A conspiracy is not ended as long as the evidence shows an intention to continue it. Such intention may be inferred from activities of conspirators in furtherance of the unlawful purpose of the alleged conspiracy.

Once a person is found to be a member of a conspiracy, he is presumed to continue his membership therein until its objective was accomplished or there was some affirmative act of termination by its members, or until his withdrawal.

A conspirator has the right to discontinue his or her participation in carrying out the alleged conspiracy, but it will take affirmative action on his part thus to withdraw and to terminate his liability for the future activities of his partners. Of course, such withdrawal does not relieve him of responsibility for his prior membership in the alleged conspiracy.

As I have already said, an unlawful conspiracy may exist even though its purposes are not accomplished, but evidence that its purposes were accomplished may be considered by you if you find that there is such evidence as proof of the existence of the conspiracy. If you find that the alleged conspiracy as charged in the indictment did exist, you must focus your attention next and separately on each defendant to determine whether the defendant knowingly and willfully became a member of the conspiracy. Of course, if you find that no conspiracy existed, that would end the consideration of Count 1, and it would be unnecessary for you to consider these other factors.

To determine whether a defendant was a member of the alleged conspiracy, you ask yourselves whether that particular defendant acted willfully and with knowledge that his acts were an integral part of the unlawful enterprise, and to help carry it forward as an associate or worker in it.

You must find that the defendant knew what the unlawful purpose was and had a stake or a personal interest in it as distinguished from acting exclusively on his own.

It is not necessary that a defendant be fully informed as to the details or the full scope of the alleged conspiracy in order to justify an inference of knowledge on his part, nor need he even know all the alleged conspirators. The guilt of an alleged conspirator is not measured by the extent or duration of his alleged participation. Even if he participated to a degree more limited than that of his co-conspirators, or in a subordinate or minor way relatively, he is equally culpable so long as he was in fact a conspirator.

The scope of each defendant's agreement must be determined individually from what was proved as to that defendant.

In order for a defendant to be held for joining others in an alleged conspiracy, he must in some sense promote the venture himself, make it his own. To do this, you must determine what each conspirator is promoting and making his

own. A single act may be the basis for drawing an actor within the ambit of an alleged conspiracy, but since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent.

Stated another way, proof of participation in a single isolated narcotic transaction is insufficient to warrant conviction of conspiracy, but when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and an intention to participate therein, that is, when the single transaction is not in itself one from which such knowledge and intent may be inferred.

I want to caution you that mere association with one or more of the alleged conspirators does not make one a member of the alleged conspiracy, nor is knowledge without participation sufficient. Of course, you should not infer membership in a conspiracy merely because of family relationship, merely because some of the defendants may have had their pictures taken together, merely because of friendship between alleged co-conspirators. You cannot find any defendant guilty merely by association.

One does not become a member of a conspiracy by rendering services to the alleged conspirators if he

does not know of the existence of the alleged conspiracy. Acts done innocently, although tending to further the object of a conspiracy, will not render their author a co-conspirator. There must be a participation in the alleged conspiracy with an intent to further the common purpose or design.

What is necessary is that the defendant participate with knowledge of at least some of the purposes and with the intent to aid in the accomplishment of those unlawful ends. In short, a person becomes a member of an alleged conspiracy by associating himself, even though informally, with a common plan or scheme by participating knowing the central aim or purpose and intending to aid in bringing about the plan or scheme.

You will recall that I stated during the trial that evidence concerning the acts, conduct, statements, and declarations made by one alleged co-conspirator outside the presence of the other defendants and alleged co-conspirators was received on a conditional or tentative basis. You will recall that earlier in the trial I sometimes ruled that evidence would be received subject to connection.

With respect to the defendants who were not present at the time such act or declaration occurred, the evidence was received subject to proof of the existence of the alleged conspiracy, and subject further to independent proof that

the defendants who were not present were knowing participants in such conspiracy. That is why it was called subject to connection.

All conspirators or alleged conspirators need not have originally and simultaneously conceived the alleged conspiracy or participated in its inception. In order to be guilty one who comes in later with knowledge of the means and purposes, although not necessarily of the details, and who intentionally cooperates in a common effort to gain the unlawful result, may become a member of the alleged conspiracy equally with the alleged conspirators, and he is legally responsible for the purposes of the conspiracy count for all of the acts done by any of the other members before or afterwards in furtherance of the common objective, just like any partner who is a member of a partnership agreement.

The acts or statements of one alleged co-conspirator may be considered by you as evidence against other alleged co-conspirators only if you find that the statements and acts were spoken and done during the continuance of the alleged conspiracy, and in aid of and for furtherance of the purpose of the alleged conspiracy. In determining whether any defendant was a party, each is entitled to individual consideration of the proof with respect to him, including any evidence of his knowledge or lack of knowledge.

His status as a partner, manager, or supervisor, his participation in key conversations or transactions, his participation in the alleged plan, scheme or agreement, must be considered.

You must find beyond a reasonable doubt that he did in fact join the alleged conspiracy with knowledge of its unlawful purpose and intended to aid and assist in accomplishing that purpose. This intent may be inferred from his acts and declarations and no direct proof is necessary. In sum, the participation of a defendant must be established by his own actions, by his own statements and declarations, or by his own connection with the acts and statements of other alleged co-conspirators.

It is contended here that the Government has failed to prove the existence of only one alleged conspiracy but has proved several separate and independent alleged conspiracies involving various of the defendants.

Proof of such several separate and independent conspiracies is not proof of the single overall conspiracy as charged in the indictment, and if you find that the Government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty.

In determining whether there was a single overall conspiracy, you may consider what the evidence shows as to

time, parties, or objects, and changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel and activities, provided you find that some of the co-conspirators continued throughout the life of the alleged conspiracy, and that the purposes of the alleged conspiracy continued to be those charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants, the alleged conspiracy would be the same basic scheme even though in the course of its operation additional alleged conspirators joined in and performed functions to carry out the scheme while others were not active or had terminated their relationship.

On the other hand, if you find that one overall conspiracy terminated and another one was formed, you may not find a single conspiracy even though the purposes of both conspiracies were the same and that some of the defendants were members of both.

In essence, therefore, the question is, what is the nature of the agreement? That is for you to determine after examining all the evidence. Thus, to summarize my

discussion of the third question, whether a defendant was a member of the alleged conspiracy, where you find that a violation of the statute was sought to be accomplished, and two or more persons actuated by a common purpose of accomplishing that end knowingly worked together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the alleged conspiracy even though his part in it may be separated in time from the activities of his co-conspirators.

If you find that the alleged conspiracy existed and that the particular defendant as to whom the charges are being considered by you was a member, you reach the fourth and final step, and that is that you must determine whether one or more members of the alleged conspiracy, not necessarily the particular defendant you are considering, has committed one or more of the overt acts alleged in the indictment to have been committed in furtherance of some object or purpose of the alleged conspiracy, and that it was committed in furtherance of that act, object, or purpose.

The offense of conspiracy is complete when the unlawful agreement is made, and any single related overt act in furtherance of it is done by one of the alleged co-conspirators. Thereafter, an act done by any one of the alleged conspirators in furtherance of the alleged conspiracy

becomes an act by all members of the illegal partnership.

Of course, an overt act by one who is not a member of the alleged conspiracy would not apply.

What is an overt act? An overt act is an act or step or action or conduct taken to achieve, accomplish, or further the objective of the alleged conspiracy.

The purpose of requiring proof of an overt act is to assure that where parties have conspired and agreed to do some unlawful thing but that they have changed their minds and abandoned the project, or have done nothing at all to carry it out, they will not be charged with a crime.

The prosecution, on the other hand, is not required to set forth in the indictment each and every act on which it relies to establish the alleged conspiracy, or on which it relies to establish each defendant's participation in such conspiracy, nor is the prosecution required to prove each overt act which may have occurred during and in furtherance of such conspiracy.

It is required to prove, however, that at least one such act did take place. The overt act need not be a criminal act in and of itself, nor need it be the crime which is the object of the alleged conspiracy. It may consist of the holding of a meeting or the like, provided the act was to further the objective of the alleged conspiracy.

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Turning to the alleged overt acts, the real question that you have to decide if you reach that point is whether any of these acts occurred in furtherance of the alleged conspiracy. This is fully a question of intent with respect to the people alleged to have committed them.

The Government contends that one or more of the following overt acts, among others, charged in the indictment, were committed as stated therein:

That in pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

That in or about November 1971, Co-conspirator Herbert Sperling delivered to Defendant Vincent Pacelli, Jr., two kilograms of heroin.

That in or about September 1971, the defendant Vincent Pacelli, Jr. delivered approximately two kilograms of heroin to Defendant Alfred Catino, also known as Barbie, and John Fazzalari, also known as Fuzzy.

That in or about the month of December 1971, the defendant Vincent Pacelli, Jr. delivered one kilogram of cocaine to the defendants Alfred DeFranco, also known as Skinny, and John Fazzalari, also known as Fuzzy.

That on or about August 16, 1972 the defendant Benjamin Mallah had a conversation with co-conspirator

Herbert Sperling in front of 844 Seventh Avenue, New York, New York.

That in or about the month of December 1972, the defendant Barney Barrett was in the vicinity of 844 Seventh Avenue, New York, New York.

That on or about January 10, 1973 the defendant Jack Spada had in his possession approximately two and a half kilograms of heroin.

That completes the discussion of the conspiracy count.

I will now turn to the essential elements of the substantive counts, number 2, 3, 5, 6 and 7.

Before you can find the named defendants guilty of the crimes charged in those counts of this indictment, you must be convinced and find beyond a reasonable doubt that the Government has proved the following essential elements:

First, that on or about the dates set forth in each count, the defendant or defendants named in that count distributed or possessed with intent to distribute the narcotic drug controlled substance named in the count. It is sufficient if you find either distribution or possession with intent to distribute.

Second, that he did so unlawfully, willfully, and knowingly.

Third, that the substance alleged to be narcotics which was distributed or possessed was in fact heroin or cocaine.

The word "distribute" means the actual or constructive or attempted transfer of the drug. The word "possess" has its common, everyday meaning, that is, to have something within your control. And to have something within your control does not necessarily mean to have it in your hands or pocket. Control may be demonstrated by the existence of a working relationship between the person having such control and the person with actual physical custody.

The word "intent" refers to a person's state of mind, so the term "possess with intent to distribute" can be fairly stated to mean to control an item with the state of mind or a purpose to transfer that item or to cause it to be transferred.

The proof of actual possession is not necessary to sustain a conviction for violation of the statutes involved. Constructive possession is sufficient. Such possession need not be exclusive but may be shared with others. Moreover, it may be proven by circumstantial as well as by direct evidence.

However, mere presence in the area where a narcotic drug is discovered or the mere association with a

person who controls the drug or the property where it is located is insufficient to support a finding of possession.

If you find beyond a reasonable doubt that the transfers alleged were made, I charge you that each such transfer satisfies this requirement of the statute.

As to the second element, the terms "unlawfully, willfully and knowingly" mean that you must be satisfied beyond a reasonable doubt that the defendant knew what he was doing, and that he did it deliberately and voluntarily as opposed to mistakenly or accidentally or as the result of some coercion.

Of course, it is not necessary that the defendant knew he was violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that he was aware of the general unlawful nature of his acts.

As to the third element, the indictment charges that the narcotic drug controlled substance is either heroin or cocaine. I instruct you as a matter of law that heroin or cocaine are narcotic controlled substances. You, however, must still find beyond a reasonable doubt that the substance is heroin or cocaine as charged in the specific count.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on in it, the only way you have of arriving at a decision on

these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts. Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before the jury nor need there be testimony by chemists as long as the jury finds that the evidence furnishes a basis for inferring that the substance in question was narcotics.

As to Counts 2, 3, 5, 6, and 7, the Government has offered the testimony of the alleged co-conspirator, Barry Lipsky, as proof that the substances in the above counts were heroin or cocaine.

Lipsky testified that he weighed and tested those substances either before or after he received or delivered them, and that further, in each case, his tests showed that the substance was heroin or cocaine.

The Government also relies on circumstantial evidence tending to establish that the material in question was narcotic drugs, the alleged secrecy and deviousness with which the transactions were handled, the alleged fact that the substance in which they were dealing was a white powder, the allegedly high prices allegedly paid for the substances, and the alleged lack of complaint on the part of the purchasers.

I have now reviewed the elements of the substantive counts which the Government must prove beyond a reasonable doubt before you may find that the defendant is guilty on those counts. There is furthermore another method by which you should evaluate the evidence and which would sustain the guilt on the substantive counts of the defendant charged, even though the Government's proof thereon was not sufficient to establish all the required elements as to him.

You will recall the instructions I have given you as to the crime of conspiracy charged in the first count. If you find pursuant to those instructions that a particular defendant was a conspirator, and hence guilty under the first count, you may find him guilty as well under a substantive count in the indictment, providing you find that the crime charged in the substantive count was committed, and that it was committed during and in furtherance of the

conspiracy charged in the first count.

If he is a member of a conspiracy, just like a partner he is criminally responsible for the substantive crime, and may be found guilty thereof.

The reason for this is that his co-conspirator committing the substantive crime is the agent of the other members of the alleged conspiracy.

However, if a particular defendant was not a member of the alleged conspiracy, or if the crime charged in the substantive count was not committed during the pendency of the alleged conspiracy, or if the crime charged in the substantive count was not done in furtherance of the conspiracy, then you may not find the defendant guilty of the substantive count unless the Government has proved beyond a reasonable doubt that, along with all the other elements I have given you, the defendant did the acts charged in that particular substantive count or aided and abetted in the commission of the substantive crime.

In this connection, Section 2 of Title 18 of the United States Code provides that a person who aids, abets, counsels, commands, induces, or procures the commission of an offense against the United States is as equally punishable as the person who commits the offense directly himself.

Much of the evidence adduced by the Government

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was adduced in support of the conspiracy count of the indictment. Much of the same evidence has also been produced in support of the substantive counts of the indictment.

If the evidence relates to and is connected up with the conspiracy count and the substantive counts, there is nothing inconsistent with using parts of the same evidence to prove that a particular defendant committed a substantive crime and also to prove that he was a member of the conspiracy. You may also be asking yourselves whether the same testimony as to the use of the evidence applies to the substantive counts as to the conspiracy count.

Particularly, you may be wondering whether if you find that all of the elements of the alleged conspiracy were present as to two or more defendants, acts or declarations of one alleged conspirator in furtherance of the alleged conspiracy may be considered in determining the guilt or innocence of the member defendants on the substantive counts. The short answer to this question is yes. Evidence of acts and declarations of one conspirator binding on a confederate on an agency theory, are not to be confined to the conspiracy charge. Such evidence is also competent to prove guilt of the substantive crime if you find that there was a conspiracy in existence and that the defendant was a member of it.

As I indicated previously, to convict on a

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substantive count you must also find beyond a reasonable doubt that the defendant acted unlawfully, willfully, and knowingly, and I have already defined those terms for you.

I am going to pause for a few moments to give you an opportunity to relax, since I am about to take up the contentions in respect to specific areas, so if you just relax in your chairs or if you'd like to rise and stretch for a few moments, we will go on shortly.

(Pause.)

Now, although there has been a fair amount of testimony, the issues that you are called upon to decide seem to be relatively simple. We have had a number of delays and interruptions of the trial. I think it is desirable so as to bring the evidence within the framework of the charge contained in the indictment, to review in broad outline the testimony insofar as it pertains to each defendant and each count. However, I caution you that in doing so, it is nonetheless your recollection of all the evidence that controls and not my statement or the way I marshal the references.

Unless you agree, no inference is to be drawn for or against the defendant from the manner or substance of any incompleteness of my review or of my recollection, none of which controls your determination, as I have said to you before.

I will now deal with the evidence adduced by the Government which it contends points to the guilt of each defendant, first in summary form by counts and then by defendants one by one.

This summary, while somewhat lengthy, is by no means exhaustive. I shall present to you the contentions as to the evidence relied on by the Government, and those on behalf of the defendant, in order to focus the factual questions that you must decide.

You may and you must consider all the evidence presented before you, and even if I fail to mention a particular contention, or a particular fact to which a witness testified, or a particular exhibit which has been admitted in evidence here, that fact or contention or exhibit must still be considered and reviewed by you, and you must not infer from this summary that the Court accepts or rejects certain parts of the record. The function of believing or disbelieving testimony and of accepting or rejecting inferences to be drawn from the evidence lies squarely within your province. The Court expresses no opinion as to the validity of any contention made by the defendant or by the Government. It is your recollection of the evidence that controls.

The following contentions as to the state of the

proof is given for whatever aid you may find in it, if any. If your recollection differs from these contentions, it is your own recollection that you should rely on.

The Government contends that its proof shows the existence of a broad narcotics conspiracy and network dealing in heroin and cocaine in which the defendants on trial allegedly had their respective functions or participations. The Government contends that its proof on the disclosure of the alleged conspiracy and its alleged participants principally comes from two alleged workers in the alleged organization, the witnesses Lipsky and Conforti, and the wife of a third, Mrs. Louis Mileto.

Twenty-six additional persons were called and appeared and gave evidence either in person or by stipulation on behalf of the Government.

The evidence of these witnesses was adduced to endeavor to support some aspect of the Government's contentions and to corroborate its principal witnesses. The Government has also introduced for your consideration a number of exhibits allegedly supporting some aspect of its contentions such as alleged narcotics testing and mixing equipment seized, white powders alleged to be narcotics, photographs, and other items.

You are at liberty to request to see any of the

exhibits marked in evidence, should you so desire.

From this array, in summary, the Government contends that the evidence among other things allegedly shows the following:

That there was a single conspiracy among all the defendants on trial, and other persons whose names you have heard, to purchase, process and resell narcotic drugs, which conspiracy was in existence within the period May 1, 1971 to September 1, 1973.

That the hub of the alleged conspiracy consisted of the defendant Pacelli and the alleged co-conspirator Herbert Sperling, who, each having at his command the services of alleged workers and others, and the sources and outlets for drugs, caused such drugs to be bought, sold, and processed. That Pacelli, having good sources of cocaine, sold cocaine to Sperling for resale to Sperling's customers. That Sperling, having good sources of heroin, sold heroin to Pacelli for resale to Pacelli's customers. That Pacelli sold cocaine to the defendant Mallah and to Herbert Sperling for resale to Mallah's and Sperling's customers. That the defendant Mallah and his alleged partner and co-conspirator, Herbert Sperling, sold heroin to, among others, Pacelli, for resale to Pacelli's customers. That Pacelli sold drugs to Alfred Catino and Alfred DeFranco. And that the defendant Barney

Barrett was a worker in this alleged criminal conspiracy.

Those are the contentions of the Government as to the proof. The Government further contends that the proof shows that it was Sperling's alleged function to handle the day-to-day operations of this narcotics business while the defendant Mallah, a self-admitted bookmaker, was Sperling's alleged money man, and as such, supplied Sperling with large sums of money with which to finance shipments of heroin and cocaine, and that Mallah received a share of the profits of the alleged enterprise.

The Government further contends that surveillance in the vicinity of Ballantine's Barber Shop shows phases of the conduct of the alleged narcotics conspiracy by Sperling, Pacelli, Mileto, Sonny Gold, and others. That Sperling was allegedly overheard by an agent secreted in the trunk of a car speaking to Ben Mallah about $50,000 worth of "stuff," which the Government contends means heroin, and was allegedly overheard discussing what the Government contends was a significant quantity of heroin and cocaine with one Ismael Torres.

The Government also contends that the proof shows that the alleged Mallah-Sperling narcotics partnership had numerous workers under its control: allegedly the defendant Barney Barrett and co-conspirators Louis Mileto and Jack

Spada, Joseph Conforti, Edward Schworak, and John Caruso, among others. And that these workers allegedly acting under instructions from Sperling mixed, bagged, distributed and sold multi-kilogram quantities of heroin, and that on at least two occasions Mallah allegedly received profit distributions from Sperling at 5 Spring Street.

The Government also contends that the proof showed numerous alleged transfers of heroin on the instructions of co-conspirator Herbert Sperling, including allegedly the times when heroin was cut or diluted by Conforti with Goldstein, Spada, Schworak or John Caruso, and the times when heroin was allegedly distributed by the defendant Barrett to Reginald Williams and by Louis Mileto, including on one occasion to Special Agent John Pope.

In summary, the defendants question the credibility and motivations of the Government's witnesses, and deny any connection with or complicity in any narcotics or related transactions or schemes in connection therewith.

The defendants respectively contend through the arguments of their counsel that there is no corroboration by witnesses or circumstances of Lipsky, Conforti, Mrs. Mileto, or any other witnesses, or aspects of their testimony relating to narcotics matters or anything else involved therein.

Each defendant relies on the presumption of his innocence, and claims that in all events guilt has not been established beyond a reasonable doubt as to him.

I will now turn to the defendants, one by one, with respect to their alleged connection with the counts in which they are charged.

The defendant Benjamin Mallah is charged in Count 1 with conspiracy. The Government contends that the defendant Mallah was connected in some or another manner to the alleged conspiracy by the witnesses Lipsky, Mrs. Mileto, Conforti, and by the Government Agents Stromfeld, Hayward, Samuel and Waniewski, and also by Sergeant De Luca and Patrolman Lino, and by the stipulated testimony of Nancy O'Malley and by testimony from Mark Miklitsch, the fifteen-year-old boy.

The Government contends that from the proof the jury could find Defendant Mallah was Sperling's money partner, that in the summer of 1971 the defendant Mallah was present in Sperling's apartment at 5 Spring Street in New York City where there allegedly were eight to ten clear plastic packages containing white powder, which the Government submits was narcotics, on a table. That the Government's witness, Cecile Mileto, allegedly overheard Mallah ask Sperling if he had enough money for this, and that Mileto

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then allegedly put the packets into the trunk of his car. And then on another occasion just before Christmas of 1971, Sperling allegedly was counting a large sum of money at 5 Spring Street and he allegedly told Mallah that $75,000 was not a bad haul. That Louis Mileto allegedly made another delivery of approximately $60,000 to 5 Spring Street, which Mileto told Conforti was being delivered to Mallah. And shortly after Mileto went in there, Conforti allegedly saw Mallah leaving 5 Spring Street carrying the package in which Mileto had packed the $60,000.

The Government contends that Mrs. Mileto's son, Mark Miklitsch, observed Mallah at 5 Spring Street in Sperling's apartment, and at Mileto's home, and that on one occasion Mallah allegedly gave Mrs. Mileto a couch and other furniture from his apartment.

The Government contends that the proof shows that Sergeant De Luca saw Mallah and Sperling together in the downtown neighborhood of 5 Spring Street, walking together in the area and entering 5 Spring Street just before Mileto came out.

The Government also points to a photograph showing Mallah and Sperling in conversation on Seventh Avenue.

The Government further contends that its proof shows that on August 16, 1972, Patrolman Gerald Lino,

stationed in the trunk of a car on the street, overheard Mallah and Sperling discuss $50,000 and "stuff," that the "stuff" allegedly referred to narcotics. Also that its proof shows that both Pacelli and Louis Mileto referred to Mallah as Sperling's narcotics partner, and that Louis Mileto informed Joseph Conforti that Mallah supplied Sperling with funds for the purchase of narcotics.

The Government contends that from its proof you may infer that after he was indicted here, Mallah adopted the fictitious name Geller, obtained identification in that name, opened a bank account in that name, and took an apartment in that name and changed his appearance allegedly to conceal his whereabouts and identity from law enforcement officers seeking his arrest under a bench warrant issued in connection with the indictment in this case.

The Government also directs your attention to the approximately $8500 mostly in hundred-dollar bills in Mallah's possession at the time of his arrest.

The defendant Mallah testified on his own behalf. In addition to the defendant's contentions in summary mentioned above, made on Mallah's behalf, he specifically denied each and every charge made against him by the Government and denied ever having had any transaction or conversation related to or connected with narcotics, and he denied

ever seeing or touching drugs.

Mallah contends that he is only a bookmaker by occupation, and has been such for 25 years.

He produced witnesses with whom he gambled. This, he says, accounts for his presence in and about Ballantine's Barber Shop and the Stage Delicatessen. It also accounts, he contends, for the large amount of cash, mostly in hundred-dollar bills, found in his possession when he was arrested, and for his use of false names and identification data both before and after the narcotics indictment.

Mallah denied knowing Pacelli in 1971 or knowing Lipsky, Louis Mileto, Catino, DeFranco, Spada, Conforti, or Mrs. Mileto, and until he came to court on this case, he contends he never met his co-defendants or the Government's witnesses Conforti or Mrs. Mileto.

Mallah admits knowing Herbert Sperling but only in connection with gambling. He denies ever being with Sperling downtown on Spring Street or in Sperling's apartment at 5 Spring Street.

He denies ever talking to Sperling about $50,000 on Seventh Avenue and claims he never saw $75,000 in his life. He claims he owes money and has judgments against him.

Mallah denies Mrs. Mileto's testimony that he gave her a couch or any furniture.

Turning now to the defendant Alfred Catino, he is charged in Count 1 as a conspirator, and in Count 2, together with Defendant Pacelli and John Fazzalari, with a substantive narcotics offense in September 1971 involving two kilos of heroin.

The Government contends that Catino was connected with the alleged conspiracy charge through testimony of Mrs. Mileto and Barry Lipsky and with the substantive charge through Barry Lipsky.

The Government contends that the proof with respect to Catino shows an alleged narcotics transaction in the late summer in which Vincent Pacelli and Barry Lipsky went to the social club on 115th Street between First and Pleasant Avenues, that inside the club Pacelli allegedly met with Alfred Catino and John Fazzalari, and Catino gave Pacelli keys and registration ticket to a red Chevrolet. That Pacelli then allegedly told Lipsky to "mix up two kilos of junk for Herbie and Fuzzy," and "bring the car back and park it nearby." That Lipsky allegedly went to his apartment at 1420 Third Avenue, and packed up two kilos of heroin, put the four half-kilogram bags into a brown bag and put them in the trunk of the red Chevrolet, which he drove up First Avenue, parked between 113th Street and 114th Street and locked the car. That Lipsky walked to and entered the social

club where he handed the keys and registration to Pacelli, telling Pacelli where the car was parked and where the two kilograms of heroin were in the car. That Pacelli then walked over to a corner and had a discussion with Catino.

The Government contends that Lipsky testified that he or Pacelli tested the heroin or cocaine as it came to the stash at 1420 Third Avenue.

The Government contends that the testimony shows that Catino received kilogram quantities of narcotics from Vincent Pacelli, Jr., including on one occasion three or four kilograms of heroin in June or July of 1971 in addition to the two kilograms later that summer mentioned above.

The Government also points to the testimony of Cecile Mileto that she saw "Al" in front of Ballantine's Barber Shop on numerous occasions in the company, among others, of the alleged co-conspirators Sperling and Goldstein, and that on one occasion her husband, Louis Mileto, allegedly asked Catino if he had done what he was supposed to do.

The Government also points to Catino's possession of eight chemical thermometers at the time of his arrest.

In addition to the defendants' contentions in summary already mentioned, counsel for the defendant Catino points to the following on behalf of Catino: That the eight thermometers seized from Catino when arrested could not be

used for the purpose she says the Government claims they were usable for, since they are Fahrenheit, they register up to only 200 degrees, which equals only about 148 degrees on a centigrade thermometer.

Counsel also points to the absence of testimony from the surveillance agents that they had seen Catino during their observation of the barber shop area.

Turning now to Defendant Alfred DeFranco who was charged in Count 1 as a conspirator and in Count 3 with Defendant Pacelli and John Fazzalari with the substantive narcotics offense in or about December 1971 involving approximately one kilogram of cocaine, the Government contends that DeFranco was connected to the alleged conspiracy charge and the substantive count through the testimony of Barry Lipsky and showed that Pacelli allegedly delivered a halfkilogram of cocaine to Catino at the social club on 115th Street between First and Pleasant Avenues, and that after that delivery Lipsky, at Pacelli's instructions, returned to the club shortly thereafter and allegedly was paid $5500 by the defendant DeFranco and the alleged co-conspirator John Fazzalari, and that in or about December 1971, Pacelli through Lipsky allegedly delivered a kilogram of cocaine to DeFranco; that in connection therewith, allegedly, Pacelli and Lipsky went to the social club on 115th Street, according to Pacelli,

to meet guys who wanted to buy a half kilo of coke; that Pacelli entered the club with Lipsky and met DeFranco and Fazzalari, allegedly; that Pacelli told Lipsky that "We're going to give a kilo of coke to Fuzzy" -- John Fazzalari -- "and Skinny" -- DeFranco, and told Lipsky to go down to the stash and mix it up. That Lipsky then asked where he should park the car, and DeFranco said, "Just bring it back in the block." That DeFranco handed Lipsky the car keys and registration to a white Cadillac parked almost right in front of the club. That Lipsky then drove down to Susan Weyl's apartment at 55 East Ninth Street, and there mixed up the kilo of cocaine, bagged it, and put it in a brown bag.

That Lipsky placed the bag under the seat of the white Cadillac and drove it back to 115th Street, parked between Pleasant and First Avenues, locked the Cadillac, went into the club, and gave the car keys and registration to DeFranco.

Those are all contentions of the Government in respect to the state of the proof.

In addition to the defendants' contentions in summary already mentioned, counsel for the defendant DeFranco points to the following on behalf of his client. He says that Barry Lipsky is the only source of the Government's proof against DeFranco, and that he was not corroborated by

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testimony or circumstances or otherwise.

As to the defendant Barney Barrett, he is charged in Count 1, the conspiracy count, and the Government contends that its proof connects Barrett with the alleged conspiracy through the witnesses Conforti, Reginald Williams, Sergeant De Luca, and Patrolman Gerald Lino.

That the proof shows he allegedly was a worker for Sperling and as such made pickups and deliveries of narcotics. The Government points to surveillance photographs on which Barrett is said to appear.

The Government further contends that Conforti was present in an apartment on 54th Street and Seventh Avenue on instructions of Spada. That allegedly three and a half kilos of pure heroin were there, that Sonny Gold and Barney Barrett came there to pick up narcotics, and allegedly found that the mixed packages of heroin were not ready, that they left and returned a half hour later, that Sonny left with his bags, that Barney Barrett wanted five bags, which he got and they left with them. That on another occasion Barney was in a parking lot and had brought his customer with him, and allegedly there was delivered to Barney by Jack Spada two and a half kilos of heroin in the parking lot. That on another occasion when Conforti was mixing three and a half kilos of pure heroin with Jack Spada at the Skyline Motel,

Spada ran short of mix, and a call was allegedly put through by Spada to Barney Barrett to get the mix, which was then delivered, that Barrett had previously told Conforti to call him or Herbie if he ever ran low on mix. That Barney handed a bag of money to Herbie in a bar which Herbie gave to Conforti to hold.

That allegedly in December 1972, Barrett gave Reginald Williams a package of narcotics, and that on an occasion on Seventh Avenue, according to Gerald Lino, Barrett went into the bar there at the suggestion of Sonny Gold to find out when they would get "it," and returned to say they would get it, as testified by Patroleman Lino.

In addition to the contentions of the defendants in summary, already mentioned, counsel for the defendant Barrett argues that Barney Barrett never told anyone at any time in the Stage Delicatessen that he could obtain mix for narcotics if it were needed; that Barrett never picked up any packages of narcotics from Joseph Conforti at an apartment in Manhattan with Sonny Gold; that Barrett never transferred narcotics for Spada in a parking lot in Manhattan; that Barrett never gave Reginald Williams a package of narcotics in December 1972; that Barrett never went into a bar on Seventh Avenue at the suggestion of Sonny Gold to find out when they would get "it," and that evidence concerning the

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pickup of a package of narcotics from Conforti at an apartment in Manhattan and was not mentioned in a previous trial.

Finally, the defendant Vincent Pacelli, Jr., is charged in every count which is before this jury -- the conspiracy count and the five substantive counts.

The Government contends that the proof connects Pacelli with the narcotics offenses charged in the indictment through the testimony of Barry Lipsky, Susan Weyl, Sergeant De Luca, and Samuel Bertolino.

In addition to the contentions as to Pacelli already indicated in the summary outline above, and more specifically the Government contends that the proof as to Defendant Pacelli shows that from April or May 1971 to February of 1972, he allegedly sold and bought heroin and cocaine, allegedly stashing the drugs with co-conspirator Lipsky at 1420 Third Avenue, and in November and December at 55 East Ninth Street in Greenwich Village.

The Government contends Pacelli received cocaine in kilo and multi-kilo quantities from Juan Jose Serrano, also known as Negron, the name by which Lipsky knew him, and heroin in kilo or multi-kilo quantities from, among others, alleged co-conspirator Herbert Sperling; and the Government contends that the proof shows that the defendant Pacelli sold cocaine and heroin in kilo and multi-kilogram

quantities to, among others, Alfred Catino, Alfred DeFranco, John Fazzalari, Nicholas Lugo, Herbert Sperling, and Benjamin Mallah.

I have already covered the Government's contentions as to the proof of Pacelli's part in the specific substantive transactions in which Catino on Count 2, and DeFranco on Count 3, were allegedly involved with Pacelli and Fazzalari.

The Government's contentions as to the proof on the remaining substantive counts, 5, 6, and 7, naming Pacelli, are as follows:

The Government contends that the proof with respect to Count 5 shows a narcotic transaction in the summer of 1971 in which Pacelli and Lipsky went to the Ballantine Barber Shop, that on this occasion Lipsky stood to one side while Pacelli spoke to Mallah, Sperling, and Mileto; that Pacelli then came over to where Lipsky was waiting and Pacelli told Lipsky to give Louis Mileto a half kilo of coke, hit it, bag it, and that Mileto gave Lipsky keys and registration to a black Ford and told him the car was parked on Spring Street near the Bowery. That Lipsky took the Ford, went to his apartment, packaged a half kilo of coke, and placed it in the trunk, and that Lipsky drove the car to First Avenue near 55th Street and returned the car keys and registration to Mileto.

Those are the Government's contentions as to the proof on that count.

With respect to Count 6, the Government contends that the proof shows a narcotics transaction in 1971 whereby Pacelli purchased two kilos of heroin from Sperling, that Pacelli took Lipsky to the vicinity of the Ballantine Barber Shop, that Pacelli explained that they were going to pick up some goods, some junk, from Sperling, that Pacelli left to go to the barber shop leaving Lipsky behind in the car. That Pacelli returned shortly with car keys and a parking claim check. That Pacelli gave the keys and claim check to Lipsky, and told Lipsky how to find the car which Pacelli described as a gold Thunderbird with a black top in a nearby municipal garage. That Pacelli told Lipsky to take the Thunderbird, that there are two kilos of junk in the trunk, and told Lipsky to stash them at Susan Weyl's apartment and return the car to the garage. That Lipsky did so, and that while at Susan Weyl's apartment, he weighed the bags and found that each was over 510 grams.

That Lipsky then returned the Thunderbird to the parking garage, that he found Pacelli, who was speaking to Mallah and Sperling in front of the barber shop, and gave Pacelli both the claim check and car keys; that sometime later Pacelli and Lipsky obtained $20,000 from Pacelli's

aunt's house and took it to Spring Street where Pacelli told Lipsky he gave $20,000 to Sperling and owed Sperling $16,000 or $18,000 more.

Those are the Government's contentions as to the proof in respect of Count 6.

As to the remaining count, Count 7, the Government contends that proof showed that in November or December 1971 Pacelli told Lipsky that the cocaine they had been getting from John Negron for $12,000, Pacelli was going to repackage and sell to Sperling for $16,000; that in November or December, Pacelli and Lipsky drove to Seventh Avenue where Pacelli left the car, explaining he was going to meet Sperling in a bar. That when Pacelli returned to the car he handed Lipsky $12,000, that they then drove to Shakespeare Avenue where Pacelli took the money and left the car and went to John Negron's house; that Negron then came out of the house and drove away. That Negron returned to the house a short time later.

Thereafter Pacelli returned to the car and handed Lipsky a quantity of cocaine; that Lipsky tested it while Pacelli drove to Ninth Street where their stash was in Susan Weyl's apartment. That Pacelli told Lipsky to go up to the apartment but not to throw anything into the goods, to just skim off the weight if it was overweight, so that each kilo was about 952 grams; that Lipsky did this and returned to the

car. That Pacelli then drove back to 55th Street and Sixth Avenue; that Pacelli again left the car; that when Pacelli returned to the car he gave Lipsky the keys to a Thunderbird telling Lipsky to put the cocaine in the trunk of the Thunderbird which was parked in a nearby garage. That Lipsky did so, and Pacelli then picked up Lipsky and they drove to the Ballantine Barber Shop where Pacelli spoke with Sperling, and that they then went into the barber shop where Benjamin Mallah was. That Pacelli returned to the car and explained to Lipsky that he, Pacelli, had to go downtown that night to pick up the other $4,000 from Sperling.

Those are the contentions of the Government with respect to the proof on Count 7.

In addition to the contentions in summary made by and on behalf of the defendants, including the defendant Pacelli as mentioned, counsel for the defendant Pacelli further argues on his behalf among other things that Pacelli had nothing to do with narcotics; that there is no evidence pertaining to Pacelli relating to any time after 1971; that there was no reason for Pacelli to have hired Lipsky; that the only connection shown between Lipsky and Pacelli are the wedding pictures; that Lipsky was no more than Pacelli's caterer; that testimony read to you concerning an investigation of Louis Valentine says nothing about Pacelli being

with Lipsky at Yellowfingers on the occasion of the surveillance

Further, counsel argues that the relationship between Susan Weyl and Barry Lipsky was that they were living together and he brought his own narcotics to her apartment; and that the procurement of bail for Cheryl Lugo's husband was a harmless favor. He argues that Lipsky on one occasion swore that Pacelli was not engaged with him in criminal activity, and that a Government prosecutor conspired with Lipsky to obstruct justice and elicit perjury from Lipsky to do so.

Again, I repeat, it is your recollection and marshaling of the evidence not counsel's arguments which are controlling. Each defendant relies on the presumption of innocence and claims that in all events guilt has not been established beyond a reasonable doubt as to him, and each defendant denies that he was part of any conspiracy or engaged in any narcotics transactions.

I have about completed with the charge. I attempted, but only in broad outline, to put before you my recollection of the rival contentions as to the state of the proof and my recollection of some of the evidence.

As I have said and I will repeat, my recollection is not necessarily accurate or complete. It is yours which is controlling. And moreover you are not to be influenced

by the matters I have given you or the manner in which I have done so.

My statement is not binding upon you in any respect except to the extent that you choose to utilize it, and confirm it from your own recollection.

Members of the jury, under your oath as jurors, you cannot allow any consideration of the punishment which might be inflicted upon a defendant, if convicted, to influence your verdict in any way, or in any sense enter into your deliberations.

The duty of imposing sentence following a conviction rests exclusively upon this Court. That is solely the judge's responsibility. Your function is to weigh the evidence in the case and to determine whether the defendants are guilty or not guilty solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and the evidence alone. You must not be influenced by any assumption, conjecture, or sympathy or any inference not warranted by the facts unless and until proved to your satisfaction.

In deliberating on this case I want you to listen to each other carefully in the jury room. If you think you are wrong and somebody else is right, do not be embarrassed

about changing your mind. But remember, each of you is to decide the case for yourself. You must bring in a verdict for or against the defendant in question on each count under which the defendant is charged, whether not guilty or guilty, and any verdict to be acceptable must be unanimous.

Use your common sense in evaluating the evidence, the circumstances, and the probabilities. Do not allow yourselves to be swayed or carried away or inflamed by appeals to passion, sympathy, or prejudice. Suspicion, conjecture, should not be substituted for evidence.

You must maintain a clear view of the case and not be sidetracked by anything or anybody from a fair, dispassionate consideration of the evidence in arriving at your resolution of the facts in the case that you are now deciding.

The oath you took right at the outset as jurors really sums up what you are supposed to do in this case, and that is, without fear or favor to any party, you will well and truly decide the issues according to the evidence and the law as stated to you by the Court.

If you desire any of the exhibits, those will be sent to you in the jury room upon request.

If you want any of the testimony read, that can be done also. It is not easy to find the testimony in the notes of the reporter, so therefore try to be as specific

as you can in regard to any requests that you do make.

Please do not communicate with anyone concerning your deliberations about this case except in writing, signed by your foreman. The young lady who sits in the first seat will, unless you choose another person, act as your foreman. She will be provided with adequate pencil and paper by the marshal.

I would like to take a few minutes to talk to the lawyers. They may wish to call to my attention any matter on which I may have misspoken or which I may have overlooked. Accordingly, I will not give this case to you as yet, or until I give you further instructions. But in order that we can logistically accomplish a free exchange between counsel and the Court, I will ask you to step into the jury room for a few minutes, and not to discuss the case as yet, not to begin your deliberations, but it will give you a chance to relax.

I haven't handed the case over to you as yet, but I will ask you to remain in the jury room mainly for convenience for a short time, and then I will re-call you, so as to resolve any further matters on which you should be instructed.

Accordingly, you may go out.

(The jury left the courtroom.)

- - -

THE COURT: I will hear counsel in respect to exceptions.

Mr. Lavin?

MR. LAVIN: Yes, your Honor.

THE COURT: Are there any exceptions on the part of the Government?

MR. LAVIN: No, your Honor.

THE COURT: Mr. LaRossa, are there any exceptions on the part of the defendant Mallah?

MR. LaROSSA: There are, your Honor. I most respectfully except to that portion of the charge which described the statutes and the congressional purpose behind it. I think your Honor's charge again, by reading the Comprehensive Drug Abuse Prevention Act of 1970 was passed by Congress, et cetera, I object to that portion of the charge.

I object most respectfully to the marshaling of the evidence and your Honor's contentions as to the Government being so out of context with the facts that it makes them completely unfair. I refer specifically to one portion of your Honor's reference to the Government's contentions that the Government contends that Mallah purchased narcotics from Vincent Pacelli.

THE COURT: Does the Government make that contention, that Mallah purchased narcotics?

MR. LAVIN: Yes, as a partner of Sperling in the course of the conspiracy, but not directly that he was paid any money or paid --

THE COURT: I think that that was such a matter of inference from the record that I am going to charge the jury that I do not find any evidence that Mallah was a purchaser.

What language would you like to have that in, Mr. LaRossa?

MR. LaROSSA: I would think that if your Honor stated that you previously said to the jury that it was the Government's contention, and I think if you will give me a moment I can read it right to you, because I think it is right here at the beginning.

Your Honor stated I think that the Government contended that the defendant Pacelli --

THE COURT: You go ahead with what you were about to say, because I can't put my finger on the part of it that you are referring to at the moment.

MR. LaROSSA: The other matter, your Honor, referred to the defendant Mallah having good sources of heroin, sold heroin to Pacelli. It is those two aspects.

THE COURT: All right. Now, I used Pacelli each time?

MR. LaROSSA: My understanding is yes, you did, sir.

THE COURT: All right. I will correct that. If you have particular language I will accommodate your language and you will have an opportunity --

MR. LaROSSA: May I write it out while the others are taking exceptions?

THE COURT: Yes.

Are there any other exceptions?

MR. LaROSSA: No, sir.

THE COURT: No other exceptions. All right.

All right, Mr. Duke.

MR. DUKE: Your Honor, I except to the failure of the Court to give my requests Nos. 4, 6, 10 and 12. I take exception to the Court's definition of conspiracy, its definition of it being a scheme, plot, understanding or agreement, and I take exception to the numerous statements by the Court to the effect that the Government need not prove this or that with respect to proving membership, and, I believe, the Court's statement that all the Government needed to prove is that the defendant had some knowledge of the purpose of the scheme.

It seems to me that is an incorrect statement of the law, and I further object to it.

THE COURT: You think that I charged that that is all the Government need prove under a conspiracy charge?

MR. DUKE: No, with respect to the issue of the defendants' membership in the conspiracy, your Honor said, if I recall correctly, a couple of times that what is required -- after saying what isn't required -- your Honor said what is required is participation with knowledge of some of the purposes of the scheme, and my contention as indicated in my request is that a co-conspirator must have considerably more knowledge than that. He must have some knowledge of what your Honor might be referring to as details of the conspiracy, the parties, the scope, the objectives, and things of that sort. There is nothing in the charge as far as I know to indicate what must be proved apart from the knowledge of the illegal purpose of the scheme.

I also object to the Court's marshaling of the evidence in that it unfairly and unnecessarily emphasized the Government's contentions and the Government's evidence and was not equally weighted in terms of the impeachment evidence and the contradicting evidence put forth by Defendant Pacelli with respect to the witnesses, the four witnesses that the Court mentioned.

THE COURT: Defendant Catino, Mrs. Rosner?

MRS. ROSNER: I take exception to the portion of the Court's charge where, in discussing the effect of a prior felony conviction on a witness' credibility, the Court said

something to the effect that the prior conviction was not conclusive or determinative on the issue of credibility. I think the jury would be entitled to find a reasonable doubt from the fact of conviction alone, and that option should be available to them.

I don't have the exact language, your Honor.

THE COURT: All right. I think that you have overlooked what I charged there. That portion of the charge I think was directed particularly at the fact that a defendant who has a felony conviction doesn't thereby become culpable for the crime before the jury.

MRS. ROSNER: No, I am making reference to an earlier portion, your Honor. On the credibility charge your Honor made reference to the fact of conviction of a felony as bearing on credibility, but I believe there was language which stated that the conviction itself was not determinative or was not the -- could not be conclusive on the issue of credibility. I think that that by inference would preclude the jury from finding a reasonable doubt from the fact of conviction of a felony, and I think they are entitled to do that.

Shall I go on, your Honor?

THE COURT: Just a minute.

What I charged was evidence that any witness has

been convicted in the past of a felony may be considered in determining his or her credibility, meaning worthiness of belief. Such evidence is presented solely to aid you in considering their believability. A prior conviction will not decide this for you in and of itself.

MRS. ROSNER: That's the portion I make reference to.

THE COURT: A conviction for a felony does not make a person necessarily unworthy of belief, but will be one of the facts which will help you decide whether to believe him or her and how far.

That is the portion?

MRS. ROSNER: I make reference to the portion where you say the conviction does not decide the issue. I think the jury is entitled to find a reasonable doubt from the fact of conviction of a felony, and that alone would tend to preclude them from doing that, if followed.

THE COURT: You mean a conviction of one felony makes it a reasonable doubt that he committed another felony?

MRS. ROSNER: The tense of the verb.

THE COURT: That is what you are telling me?

MRS. ROSNER: No, your Honor. The tense of the verb that you used is not the spirit of my argument. I say it may and the jury has the right to find a reasonable doubt

from it, not in every case that it does. But the jury certainly has that option.

THE COURT: Well, they have the option because they don't believe the witness. Isn't that what it is? Isn't that the reason why they have the option?

MRS. ROSNER: Yes, your Honor.

THE COURT: Since this charge is focused on the believability of the witness, I don't see how you can get me to charge that the mere fact that a man has been convicted may entitle the jury to find that there is reasonable doubt of the complicity in narcotics.

MRS. ROSNER: I believe that is the fact, your Honor, and I believe that is the law.

Shall I go on, your Honor?

THE COURT: Yes.

MRS. ROSNER: I also take exception to the portion of your Honor's charge --

THE COURT: By the way, have you got a case that says that, that prior conviction of a felony means that the jury can dismiss a narcotics charge?

MRS. ROSNER: I can't think of anything offhand, your Honor, but I think it is a --

THE COURT: It would be a novel doctrine. I'd like to know about such a case.

MRS. ROSNER: I will try to supply your Honor with it.

I also take exception to the portion of your Honor's charge dealing with the impeachment value of prior inconsistent statements wherein I believe your Honor charged that the jury had a duty or obligation to reconcile conflicting statements. I don't believe the jury has any such obligation and I think they are entitled to find a willful falsehood even where a view of the evidence can be had to reconcile various conflicting statements.

THE COURT: All right. Anything else?

MRS. ROSNER: In the early part of your Honor's charge, after discussing the fact that evidence had been adduced by both sides to the case, I think your Honor made reference or made some remark to the following effect: that the same standard is applied to all the evidence in the case.

In the context in which it was made, your Honor, I think the jury might have been led to believe that the defendants' evidence as well as the Government's must be believed beyond a reasonable doubt to be considered, and I don't think that is the law. I think the jury should be instructed that if reasonable doubt arises from the defendants' evidence, that is sufficient to acquit him.

THE COURT: In other words, you think I placed on

the defendant the burden of proving innocence beyond a reasonable doubt?

MRS. ROSNER: I think that.

THE COURT: There just isn't anything in the charge to that effect, Mrs. Rosner.

MRS. ROSNER: I'm sorry, your Honor. I may have misunderstood, but out of an excess of caution I would point that out.

THE COURT: All right.

MRS. ROSNER: I would also object to the giving of a Pinkerton charge in the context of the evidence against Catino, since the substantive offense in which he is named is one in which it is alleged he directly participated, and I don't think it has reference to his case.

THE COURT: All right.

The defendant DeFranco, Mr. Peluso?

MR. PELUSO: I would at this time, Judge, join in the exceptions taken by co-counsel insofar as they are applicable to Defendant DeFranco, more specifically, Judge, I would object to the marshaling of the evidence on the ground that the manner in which your Honor did so marshal the evidence was unfair in that it stated the testimony of the defendant Lipsky without presenting to the jury the fact that Defendant Lipsky admitted on the stand that on at least

three prior occasions he took an oath, and after having taken the oath, he committed perjury, without bringing to the attention of the jury the fact that although he considered himself to be a man of good memory and a man who had perhaps a photographic memory of such things as addresses, phone numbers, and license plates, was unable to specifically give the license plate number and/or the address of the club, although he stated he had been there on at least 20 occasions.

THE COURT: The defendant Barney Barrett, Mr. Mitchell?

MR. MITCHELL: If your Honor pleases, I will join in the exceptions of my co-counsel where applicable. Also, your Honor, there was one part of the charge where you were talking about the belief or disbelief of the witness' testimony and you indicated that the jury had the right to believe it in part or in whole. I think you omitted the fact that the jury if they believed that a witness was lying or committing perjury, would have a right to disregard his entire testimony.

THE COURT: I put it exactly in that frame. I will read it to you.

MR. MITCHELL: I will withdraw it, your Honor.

Now, the other point is this, your Honor, that I take exception to: In the summary of the Government's

contentions on Barrett, there was reference to a Skyline Motel and Spada, and some testimony about mix. There was nothing in this particular case about such testimony.

THE COURT: I got it right from the record.

MR. MITCHELL: What?

THE COURT: I got it right from the record.

MR. MITCHELL: I'm sorry, then, your Honor. I personally don't recall, and I have been advised by somebody else that there was no testimony to that.

THE COURT: Let me just see if I have something on that.

Do you have that at your fingertips, Mr. Lavin? Do you know what the answer is there?

MR. NESLAND: Page 40 of Confortì's testimony where they are in the Skyline Hotel in New York, page 41, "We ran short of mix I think it was about eight ounces. He says, 'I will call up Barney.'

"I told him not to use the phone, but he used the phone anyway from the hotel. I called up Barrett. He gets on the phone, he asks for Barney. I guess Barney came on the phone.

"He says, 'I ran short, I need some more -- manita.' He says, 'Joe, I will be right back. Take me 15 or 20 minutes.'"

MR. BARRETT: I never had manita in my life.

MR. MITCHELL: I will withdraw the exception.

MR. NESLAND: There is additional testimony after that further explaining that.

THE COURT: Yes. All right. I am going to give your request as requested.

Bring the jury back.

Wait a minute. There is one other thing I didn't deal with. I want to see what Mr. Duke is talking about here.

(Pause.)

THE COURT: All right. Bring the jury in now.

(In open court; jury present.)

THE COURT: My attention has been called to an over-statement on my part with respect to the defendant Mallah. I told you that the Government contends that he was the money man in the matter, and I made reference to a contention that the defendant Pacelli sold cocaine to the defendant Mallah, and that Mallah sold heroin to the defendant Pacelli, including that at the time when I made mention that Pacelli did those things with Sperling.

There is no evidence in the record to support a statement that Mallah transacted business in cocaine or in heroin in the sense of dealing with the drug. The contention here is that he was the money man or backer, as you have

heard it.

In stating to you that you might come upon conflicts in the evidence, and inconsistencies, I stated that you will have to consider whether the discrepancy involves understandable error, which can be reconciled. I want to change the phraseology of that and withdraw what I said to you, and I will read to you now the way I would like to have you understand I am charging.

If your consideration of the evidence makes it appear that there are differing versions of the facts resulting in a discrepancy in the evidence, you may if you wish consider whether the apparent discrepancy involved understandable error, which can be reconciled by fitting the two stories together in a rational relationship. In other words, in passing on all issues of credibility, you determine the degree to which and the extent to which you accept or reject the testimony.

When I directed that you should apply the same standards to all the evidence in the case, you are to understand that it is the Government's obligation, it must conform to the standard of proving its case beyond a reasonable doubt. I told you repeatedly that the defendant need prove nothing. And it is up to the Government to have established its case.

I believe that that completes all of the things

that I would like to say to you, and now I am going to hand you a form verdict that you will pass among yourselves, and Miss Johnson's copy will be the one -- the others are work copies for you -- Miss Johnson's will be filled in with your votes when you come to establish a vote, if you do, and then you can return the work copies to the clerk thereafter.

I also wish at this time to excuse Mr. Heirty from further participation in the case in view of the fact that we have twelve jurors available to participate. I want to thank you very much for your attendance and your patience in this matter.

I will say in response to some inquiry that somebody made, that the gentleman who had trouble in his family with the accident and who couldn't come back was not hurt. It was his father-in-law and mother-in-law, and just as we thought, his wife's concern sent him up there to the hospital where he telephoned in and advised us of his unavailability, but we are glad to report that he is all right, and the lady who hurt herself, I think she is all right, too.

All right, you may swear the marshals first.

Mr. Hierty, you can go down to 109.

(Two marshals were duly sworn.)

THE COURT: The marshals will be instructed to escort the jury to lunch at the Government's expense, and

stay, too, for that purpose.

What you may do if you desire to do so before you commence your deliberations, you may go out to lunch. Don't discuss the case at lunch or until you reconvene all together, and then you can start in at that time.

I will have available for you a copy of the indictment that you are considering, should you request it, and we will have segregated the exhibits should you desire to see any of those.

Miss Johnson may send out a note requesting any of those items if you need them. The jury may go out.

(12:45 p.m., the jury retires.)

(In open court; jury not present.)

THE COURT: I would think that we can definitely stand in recess until two o'clock, and from then on I would expect counsel to be available. In the meantime I would like to have the Government and defendants' counsel examine all of the exhibits to avoid any possible inadvertence in respect to any of the exhibits and lodge them with the clerk. As previously indicated, the docket sheet that was admitted in evidence only for the purpose of establishing a fact, that is, the date of filing, would not go to the jury in any event. If there was any other exhibit to which that applies, you just let me know.

MR. LaROSSA: The indictment as well as the docket sheet.

THE COURT: The indictment in this case?

MR. LaROSSA: No, sir. It was the indictment in the prior case.

THE COURT: That definitely will not go in. I have a redacted indictment here that I would like to have you gentlemen and lady examine, to be sure that if they call for an indictment, that that copy is satisfactory. I have an extra copy of the proposed form of verdict for each of the counsel, and the Government, and the clerk.

MRS. ROSNER: Your Honor, thinking that the trial would be over by today, I made an appointment with my dentist at four o'clock. I would ask leave of the Court to be absent from the jury's deliberations from approximately 3:30 until perhaps 6:30. I will leave the number for the Court where I will be.

THE COURT: Who did you say was going to cover for you in the meantime?

MRS. ROSNER: I would ask Mr. Peluso to step in.

THE COURT: Mr. Peluso, is that satisfactory?

MR. PELUSO: Yes, Judge, it is.

THE COURT: In other words, any question that comes up that would call for a response to the jury, you

will undertake to handle on behalf of the defendant Catino and Mrs. Rosner?

MR. PELUSO: I will.

THE COURT: As well as for Mr. DeFranco?

MR. PELUSO: I will, Judge.

THE COURT: Is there any conceivable conflict of interest that either counsel could possibly visualize?

MR. PELUSO: I see none, Judge.

MRS. ROSNER: I see none, your Honor.

THE COURT: Do you see any, Mr. Lavin?

MR. LAVIN: No, your Honor.

THE COURT: Mr. Catino, is it satisfactory for you to have your interests protected by Mr. Peluso during Mrs. Rosner's absence?

MR. CATINO: Yes, your Honor.

MRS. ROSNER: Thank you, Judge.

(Pause.)

THE COURT: Mrs. Rosner advises that she is in error as to the times only, and will be leaving currently to be back probably by 4:30.

MRS. ROSNER: And I will leave the number where I am going to be.

THE COURT: The same arrangements are deemed to apply, correct?

MRS. ROSNER: Yes, your Honor.

THE COURT: Mr. Duke's requests to charge are marked Court's Exhibit No. 54.

Mr.. Duke, I am marking and filing with the clerk as Court's Exhibit 54 your requests to charge.

(Court's Exhibit 54 marked.)

MR. DUKE: Your Honor, on Count 7, the defendant is plural. I think maybe it could be blocked out on that.

THE COURT: Where is that?

MR. DUKE: In Count 7.

THE COURT: Shall we just take a pen and knock it out? Maybe we can rub it out. All right?

MR. DUKE:: Yes.

THE COURT: Is this now satisfactory to everybody?

MR. DUKE: Apparently. I am not sure everybody saw it. But I guess everybody did that wanted to.

THE COURT: All right. If they ask for it that is the copy of the indictment that you give them.

(Luncheon recess.)

AFTERNOON SESSION 2:55 p.m.

(In open court; jury not present.)

THE COURT: I have a request from the jury which reads as follows:

"Please send in a copy of indictment and Picture 8 and 9 showing Pacelli."

This will be marked Court's Exhibit 55.

(Court's Exhibit 55 marked.)

THE COURT: Let me see those pictures, please.

(Mr. Lavin handed photographs to the Court.)

THE COURT: Show these to defendants' counsel and see if they agree that that is it.

(Photographs handed to defense counsel.)

THE COURT: All right, the clerk may hand those things to the marshal.

We will stand in recess.

(Recess.)

(3:45 p.m. In open court; jury not present.)

THE COURT: I have a note from the jury reading: "Testimony given on December 24 by undercover agent concerning drug transaction in sporting goods store."

What does that refer to, Mr. Lavin? Do you know?

MR. LAVIN: That is Agent Salvemini.

(Pause.)

(In open court; jury present.)

THE COURT: Miss Johnson, I have your note in which you request the testimony of the undercover agent given on December 24 in connection with the sporting goods store. Is that right?

THE FORELADY: Yes, sir.

THE COURT: Would that be Agent Salvemini? Is that the one?

All right, the reporter has the notes and he will read, and when you have heard as much as you are interested in hearing, just put your hand up and we will stop.

(The reporter read from the testimony of Agent Salvemini as requested.)

THE COURT: All right, we have a signal from the forelady that you have heard as much as you want. Is that the one?

THE FORELADY: Yes.

THE COURT: All right. You may depart. Continue your deliberations.

(4:00 p.m., the jury retired to continue deliberations.)

(4:25 p.m. In open court; jury not present.)

THE COURT: I have this note which will be marked Court's Exhibit 57. "Please let us know if anyone other

than Lipsky testified against DeFranco. If there is other testimony, may we hear it."

Now, it seems to me that we could agree on that and just send a note back instead of asking the jury to come out. My recollection is that there is no other witness who testified other than Lipsky; is that correct?

MR. LAVIN: That is correct, your Honor.

THE COURT: Is it satisfactory if I endorse this note and just send it back?

MR. PELUSO: Satisfactory, your Honor.

THE COURT: I have endorsed this note with the word "no," and signed my name, and written on it, "Please return this note to the marshal so that we can have it in the Court exhibits."

Defendants may look at it.

MR. PELUSO: Judge, can we have the question read?

THE COURT: Read it yourself.

MR. PELUSO: Judge, I think perhaps "no" alone might be a little ambiguous.

THE COURT: What's ambiguous about "no"? They ask, "Please let us know whether there is anybody but Lipsky." The answer is no. What do you want me to say, no, positively no?

MR. PELUSO: "No, there is no other witness."

THE COURT: I think that is sufficient.

MR. DUKE: Judge, I think the point is that "no" may mean that it is a refusal.

THE COURT: Have you looked at the note?

MR. DUKE: I heard what you said.

THE COURT: Please look at the note and see where I put the word.

MR. PELUSO: Judge, it also said if there is other testimony.

THE COURT: Please look at the note and see what I have done with it.

Hand it back up here and I will put down "no other." You know, you can split hairs, too.

Now look at it and see if it is satisfactory.

MR. PELUSO: Thank you, Judge.

THE COURT: All right. Hand it to the marshal.

(Recess.)

(6:25 p.m. In open court. Present: Messrs. Lavin, LaRossa, Mallah.)

MR. LaROSSA: Mr. Fischetti from my office is fully familiar with the case of United States against Mallah, and will stay in my stead during the deliberations this evening. This is acceptable to Mr. Mallah, Mr. Fischetti, and Mr. Lavin.

Is that correct, Mr. Mallah?

MR. MALLAH: Yes.

MR. LaROSSA: Mr. Fischetti?

MR. FISCHETTI: Yes.

MR. LaROSSA: And Mr. Lavin?

MR. LAVIN: Yes.

THE COURT: It is acceptable to the Court.

(9:35 p.m. In open court; jury not present.)

THE COURT: I have a note from the jury: "May we please listen to Lipsky's testimony about DeFranco and cross-examination by DeFranco's lawyer."

I assume that is Mr. Peluso.

Fortunately, we have that transcribed so that it will make it easier to get it.

(In open court; jury present.)

THE COURT: Mrs. Johnson, we have your note in which you asked to listen to the Lipsky testimony about DeFranco, and the cross-examination by DeFranco's lawyer. That is Mr. Peluso.

THE FORELADY: Yes.

THE COURT: The reporter will now read it to you.

(The reporter read from the testimony of Barry Lipsky.)

(10:00 p.m., the jury retired to continue

deliberations.)

MR. MITCHELL: Your Honor, I have a request.

THE COURT: Yes, Mr. Mitchell.

MR. MITCHELL: I had advised you previously that I was supposed to start a trial and I had given affidavits. I have been advised that I must start tomorrow morning, and my client has consented if somebody would cover me. Mr. Peluso will cover.

THE COURT: In other words, you'd like to be excused if this case goes over until tomorrow?

MR. MITCHELL: Yes.

THE COURT: So that you can go to this other court?

MR. MITCHELL: Yes.

THE COURT: What court is that?

MR. MITCHELL: It is Trial 2 at 100 Centre Street. I am supposed to start at 9:30 on a jury trial.

THE COURT: Is there any conceivable conflict of interest between your client and Mr. Peluso's client?

MR. MITCHELL: Not that I know of.

THE COURT: Mr. Peluso, is there any conceivable conflict of interest?

MR. PELUSO: Not that I know of.

THE COURT: Do Mr. DeFranco and Mr. Barney Barrett both consent to this procedure?

MR. PELUSO: Mr. DeFranco does consent, Judge.

MR. MITCHELL: Mr. Barrett consents.

THE COURT: Mr. Barrett, do you consent?

MR. BARRETT: Yes.

THE COURT: Mr. DeFranco, do you consent?

MR. DeFRANCO: Yes.

THE COURT: All right, then, you may be excused tomorrow morning for that purpose, Mr. Mitchell.

We will stand in recess.

(10:15 p.m., recess taken.)

(10:50 p.m. In open court; jury not present.)

THE COURT: This question from the jury reads: "Was the car and date involved in the testimony read by Mr. Duke about Valentine being trailed by the agent to and from Yellowfingers the same car and date as described by Lipsky in his testimony about the time he was eating with Pacelli at Yellowfingers and he made a drug deal?"

Isn't it my recollection that it was -- what is that other man's name whose car was involved?

MR. MITCHELL: Gonzalez, it was Gonzalez' car. It was Gonzalez' car.

THE COURT: The car is not the same and the date, what about that?

What do you say to this, Mr. Duke?

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MR. DUKE: Your Honor, my initial impression was affirmative but I'd appreciate it if you'd reread it. I'm not sure I understand it.

THE COURT: Would you come and look at it yourself? I think it is easier to absorb as you read it.

(Document handed to Mr. Duke.)

THE COURT: It was Gonzalez' car, if I remember correctly.

MR. DUKE: I think the answer is yes, your Honor.

THE COURT: The answer is yes what? It was the same car?

MR. DUKE: Same car and date.

THE COURT: I wouldn't be too quick about that.

MR. DUKE: Your Honor, I guess really the meaning of the question is not sufficiently clear to give a categorical response to.

THE COURT: Where is that record you read from?

One leg of the inquiry seems rather clear. Where is that note? Where is the description?

MR. LAVIN: Your Honor, I believe it is on 346.

THE COURT: Have you looked at 346?

MR. DUKE: Yes.

THE COURT: Do you have any comment now? Are you satisfied one way or the other?

MR. DUKE: I think I would be satisfied to say yes to that question.

THE COURT: How about you?

MR. LAVIN: Is it the same? There is no testimony in this trial about the description of the car, just that it was Valentine in late September parked a car.

THE COURT: Wasn't it the same, though? Isn't it the Yellowfingers occasion? Then that's the same car.

MR. LAVIN: We know it is, but there is nothing in this record, on Lipsky's cross.

THE COURT: They are prepared to say yes. Are you prepared to say yes?

MR. LAVIN: I am prepared to say yes.

THE COURT: Mr. Duke, your answer to this inquiry is yes?

MR. DUKE: Yes.

THE COURT: And Mr. Lavin has no objection to saying yes. Shall I endorse the word "yes" on here?

MR. DUKE: Your Honor, may I confer with my client?

(Pause.)

MR. DUKE: Your Honor, I would suggest that the safest course would be to read the relevant portions of the testimony to the jury.

THE COURT: I don't think that is necessary. If

you can't agree on it I will resolve it. I have looked at the testimony, you pointed out the pages to me. The agent testified according to what I let you read that it was September 28, it was Gonzalez' car, it was a 1969 blue Pontiac Grand Prix with New Jersey plates.

Do you agree to that?

MR. DUKE: Yes.

THE COURT: And it was Valentine that was being trailed; you agree to that?

MR. DUKE: Yes.

THE COURT: And at page 346 of the record on your cross examination you specifically inquired about Yellowfingers Restaurant and you asked Lipsky, "Did you testify on a prior occasion in court that you and Mr. Pacelli in late September 1971 met a man named Valentine at Yellowfingers," and he acknowledged that he did.

"That you and Mr. Pacelli had dinner that evening at Yellowfingers?", and he acknowledged that he did.

Then there was the episode about Lipsky driving to his apartment, obtaining some cocaine, returning the car and coming to Yellowfingers.

You asked the specific question, "Did you testify on a prior occasion in court that you and Mr. Pacelli in late September 1971 met a man named Valentine at Yellowfingers";

so you must have had this incident specifically in mind.

MR. DUKE: Oh, yes, I did.

THE COURT: Therefore, what is the hesitancy? You have told me that the answer is yes. Now you are not trying to psych the jury on this thing. We are trying to answer a factual question.

MR. DUKE: Your Honor, literally the answer to the question is yes. I just have some reservations about what the jury is concerned about.

THE COURT: That is not my concern, what they are concerned about. They are not telling us what they are thinking. They are asking a question. In view of the record and your acknowledgements and Mr. Lavin's willingness to agree, I will endorse this note with the word "yes," and ask the marshal to take it.

It may be marked Court's Exhibit 59.

(Court's Exhibit 59 marked.)

THE COURT: I will ask the marshal to give it to the jury and to get it back again for you.

(Recess.)

(11:35 p.m. In the robing room; all counsel present.)

THE COURT: How about this suggestion? We are getting on to almost the midnight hour. What do you think

if I were to send in a note to the jury, "Would you like to suspend deliberations at this point and go to a hotel for the night and resume tomorrow morning at ten o'clock?"

MRS. ROSNER: I for one would object to that, your Honor. I would suggest that we send them in a note asking them if they would like to suspend, and whether they have a preference either to return to their homes, perhaps accompanied by --

THE COURT: I am not giving them any preferences.

MRS. ROSNER: May I just state my position for the record?

THE COURT: I am not giving them any preferences. I am going to sequester the jury.

MRS. ROSNER: I would object to that.

THE COURT: I note your objection.

The only question here is whether we have reached the point now, having started a trial today at ten o'clock and it is now almost twelve o'clock midnight, whether we ought not to indicate to them that they can have their choice of suspending at this point and go to a hotel for the night and resume tomorrow morning.

What does the Government think?

MR. LAVIN: I think that is agreeable to the Government.

THE COURT: We have eight women on that jury and they are not all as strong as Mrs. Rosner.

What do you say, Mr. Mitchell?

MR. MITCHELL: I go along with the note.

THE COURT: Mr. Peluso?

MR. PELUSO: I am inclined to go along, Judge.

THE COURT: Mr. LaRossa?

MR. LaROSSA: Yes, sir.

THE COURT: Mr. Duke?

MR. DUKE: Well, I agree with the question about suspension but I agree with Mrs. Rosner about the sequestration.

THE COURT: Well, the sequestration is part of, I think, my province in order to safeguard the jury under these circumstances, so that I frankly am not inclined to solicit your consent on that subject.

MR. DUKE: I was just indicating that I agree with all of the note except that portion of it that indicates that they are going to a hotel.

THE COURT: Are you objecting to my suggesting in the note about going to a hotel?

MR. DUKE: Well, I guess -- yes, I guess I would suggest that you just ask them if they are ready to suspend and then, if they say they are going to suspend, then you

tell them what you are going to do with them.

MRS. ROSNER: I would agree with Mr. Duke, your Honor.

THE COURT: You like that better?

MRS. ROSNER: Yes.

THE COURT: Does that take away the sting of the other point?

MRS. ROSNER: I still object to the sequestration but I don't think the jury should be told they are going to be sequestered before making a decision about suspending.

THE COURT: That is a little different.

"Would you like to suspend your deliberations at this point?" Does it make it redundant if I add "for the evening"?

MR. LaROSSA: I think you should, because the way it is now it makes it sound like they are being discharged almost.

THE COURT: "Deliberations for the evening at this point."

MR. LaROSSA: Yes.

THE COURT: Why don't I just leave it, "Would you like to suspend your deliberations for the evening?"

MR. LaROSSA: Fine.

THE COURT: Is that satisfactory, Mr. Duke?

MR. DUKE: Yes.

THE COURT: Mr. Lavin?

MR. LAVIN: Yes.

THE COURT: Mrs. Rosner?

MRS. ROSNER: Yes.

THE COURT: Mr. Mitchell?

MR. MITCHELL: Yes.

THE COURT: Mr. Peluso?

MR. PELUSO: Yes.

THE COURT: All right. Hand this to the marshal and tell the marshal to get me an answer on the note.

(Recess.)

(11:45.)

THE COURT: Very briefly, I guess that is an abbreviation for the word "continue." Pass it around.

They said, "We will con't."

(12:30 a.m. In open court; jury present.)

THE COURT: Ladies and gentlemen, I have the note from Miss Johnson, and let me inquire this way:

Miss Johnson, has the jury unanimously agreed as to any count with respect to any person?

THE FORELADY: Yes.

THE COURT: I will permit you to report such of the unanimous agreements as you have already reached, just

report the unanimous verdicts.

THE FORELADY: On the conspiracy charge --

THE COURT: Have you agreed unanimously on the conspiracy count in respect of any defendant, and if so, give me his name.

THE FORELADY: All right. We have agreed unanimously--

THE COURT: Would you mind rising so that the reporter can hear you.

THE FORELADY: I am sorry, excuse me. That Defendant A, Benjamin Mallah, is guilty. That Defendant B, Vincent Pacelli, guilty. Defendant C, Alfred Catino, guilty. Defendant D, Alfred DeFranco -- no, I'm sorry -- I'd better leave that. We haven't reached a decision.

THE COURT: You have not agreed yet on DeFranco?

THE FORELADY: Right.

THE COURT: Don't report on that.

THE FORELADY: And E, Barney Barrett, guilty just on the conspiracy charge.

THE COURT: What you have just announced to me, and I will repeat it again, you the jury say that you have agreed on the conspiracy count and find that Benjamin Mallah is guilty, Vincent Pacelli, Jr. is guilty, Alfred Catino is guilty, and Barney Barrett is guilty.

THE FORELADY: Yes, sir.

THE COURT: Have you agreed in respect to Count No. 2?

THE FORELADY: Yes, we have.

THE COURT: What is your verdict in respect of Vincent Pacelli, Jr.?

THE FORELADY: Guilty.

THE COURT: What is your verdict with respect to Alfred Catino?

THE FORELADY: Guilty.

THE COURT: Have you agreed unanimously on any other count as yet?

THE FORELADY: No, we have not.

THE COURT: Your note asks me what to do about these other items on which you haven't agreed, and you want to know, should "we retire for the night?"

Let me first poll the jury. You may sit down.

Ladies and gentlemen, hearken to the verdict that your forelady, Miss Johnson, has announced:

She has announced that on Count 1 conspiracy, Benjamin Mallah is found guilty, Vincent Pacelli, Jr. is found guilty, Alred Catino is found guilty, Barney Barrett is found guilty. On Count 2 Vincent Pacelli is found guilty, and Alred Catino is found guilty.

(Each juror, upon being asked by the Court, "Is

that your verdict?", answered in the affirmative.)

THE COURT: Now, Miss Johnson, in view of the lateness of the hour, it is now 12:35 in the morning, I think that we, having made arrangements to have limousines here so that no one need go forth from the court except in some means of transportation, and we have also arranged accommodations at a suitable hotel for each and every one of you to be cared for, because there are some of you who come from great distances, that I will ask you to suspend your deliberations on the remaining counts that you have not reported on, and let the marshals take you to the hotel and get you comfortable, and see that you get a good night's rest and your breakfasts, and in view of the hour, I suggest that the marshals will return you to the court at 10:30 tomorrow morning or such earlier time as you all agree upon, at which time when you are all again assembled, you may turn your attention to the remaining counts and defendants as to whom you have not reported and as to whom you have not yet agreed, and continue your deliberations at that time.

I trust these arrangements will be comfortable and suitable and I will ask the marshals to do everything within their power to make everybody comfortable and take care of your properly.

You may accordingly now retire with this one

admonition: please don't discuss this case among yourselves any further tonight, and put it aside until you reconvene here as a jury tomorrow morning, and then after you have reconvened, take up the balance of the task that you have not yet agreed upon, and you may then continue your deliberations.

The marshals may escort the jury and please do everything that you can to see that they are comfortably situated and properly cared for.

On these papers I suggest each one of you still has your paper, hold on to them and bring them with you tomorrow morning.

(The jury left the courtroom.)

THE COURT: The court will accordingly stand in recess until 10:30 tomorrow morning, and counsel may reserve motions until we hear from the jury again.

I regret to have had to hold everybody here this late, and I know that you, Mr. Mitchell, will be engaged tomorrow morning, and we have already arranged for your absence; is that right?

MR. MITCHELL: Yes, your Honor.

THE COURT: Is there anybody else or any other counsel who have a problem tomorrow morning? If not, we will stand in recess.

MR. LAVIN: Your Honor, I'm sorry, would you

entertain a motion by the Government for a remand of the defendants Mallah and Catino at this time?

THE COURT: I will not entertain that motion at this time.

MRS. ROSNER: Thank you, your Honor.

THE COURT: My recollection is that each of the defendants who are at liberty are on bail; is that right?

MRS. ROSNER: That is correct, your Honor.

MR. LaROSSA: That's right.

THE COURT: What was the bail for Mr. Mallah?

MR. LaROSSA: $100,000.

THE COURT: And the bail for Mr. Catino?

MRS. ROSNER: $50,000 secured by residential property, your Honor.

THE COURT: That takes care of those matters.

Counsel in the case, please wait a minute. The clerk advises me that some of the jurors are writing a note about the arrangements. I want to find out what it is that is troubling them before you go.

(Pause.)

THE COURT: These are the human problems. One juror writes to me, "I have my car on the wrong side of the street and it has to be moved." I wonder whether the marshals couldn't work something out for that person.

THE MARSHAL: Yes, sir.

THE COURT: Is this a lady or a gentleman?

THE MARSHAL: That is a man.

THE COURT: Will you see what you can do? Have somebody go with him.

THE MARSHAL: Right, we will take care of that.

THE COURT: Now, Mrs. Mungin writes, "I have a dog at home and no one to walk him or feed him."

Mrs. Mungin lives in the Bronx. Would it be possible to send her with a marshal to her home in the morning and wait there while she cares for the animal and then take her back to the hotel?

THE MARSHAL: In the morning, Judge?

THE COURT: In the morning.

THE MARSHAL: She is talking about now.

THE COURT: Now?

THE MARSHAL: She's been trying to get hold of somebody to walk that dog all night, and nobody answers the phone.

THE COURT: Is it possible to send somebody up there with her now?

THE MARSHAL: Yes, sir.

THE COURT: And then let her walk the dog and then take her back to the hotel?

THE MARSHAL: Yes, sir.

THE COURT: All right. I think that in the custody of the marshal that may be accomplished.

THE MARSHAL: All right, sir.

THE COURT: See to it that her coming and going is not interfered with by anybody else, and there are to be no communications between her and anybody else, in connection with any matter except something that is personal in the presence of the marshal, and as soon as she is through taking care of the animal, just escort her to the hotel where the jurors are located for the night.

THE MARSHAL: Yes, sir.

THE COURT: All right.

Thank you.

The court will recess until tomorrow morning at 10:30.

(Adjourned to Tuesday, January 8, 1974, at 10:30 a.m.)

UNITED STATES OF AMERICA

v 73 Cr 881

BENJAMIN MALLAH et al.

New York, January 8, 1974
10:30 a.m.

(The jury resumed deliberations.)

(In open court; jury not present.)

THE COURT: Mr. LaRossa, the jury having rendered a verdict in respect to Benjamin Mallah on the only count against him, I see no reason, if you desire to attend to other business, why we can't conclude his matter at this time.

Are there any motions you wish to make?

MR. LaROSSA: Yes, sir. I would like to renew the motion for judgment of acquittal made at the end of the entire case, your Honor.

THE COURT: That motion is denied. I think the issues were issues of fact to be resolved by the jury.

We will order a pre-sentence report here and fix the date of sentence for February 26. Is that a suitable day on your calendar?

MR. LaROSSA: That is fine.

THE COURT: February 26 at 10:00 a.m., in Room 1305.

Now, with respect to the matter of bail, is there an intention of the defendant Mallah to appeal?

MR. LaROSSA: Yes, sir.

THE COURT: Will that appeal be filed promptly?

MR. LaROSSA: It will be, sir.

THE COURT: Then would you please state for the record what the present situation is as to bail?

MR. LaROSSA: $100,000 surety bond, your Honor.

THE COURT: That has been deposited?

MR. LaROSSA: It has, your Honor.

THE COURT: I will hear the Government on the matter of bail.

MR. LAVIN: Your Honor, first of all, the bail deposited by Mr. Mallah is not his funds; it is the funds of Nancy O'Malley, her passbook, and stocks that she had in the Melville Shoe Company. All the collateral posted for the $100,000 bond is hers. She is, I understand, a quite well-to-do woman, and the Government's application would be that Mr. Mallah be remanded and it believes it has reason to support that position. Mr. Mallah was a fugitive from April 13 until the time of his arrest, went under a fraudulent name and gave every indication he was about to take flight. He had $8,000 in cash on his person at the time, and on information and belief of two agents of the DEA at the time

of his arrest, he said he never would have gone to trial with Herbert Sperling. That doesn't indicate he would take flight after that, but would indicate he was aware of what was happening.

He is now facing possibly 15 years in jail. He is 48, 49 years old and has access to large amounts of cash.

Your Honor, I believe that Mr. Mallah is a prime candidate for flight. I don't contend he might be a danger to the community, but I do believe he would flee the jurisdiction of the court.

MR. LaROSSA: Would your Honor like me to respond --

THE COURT: Do you have a passport, Mr. Mallah?

MR. MALLAH: I surrendered it to Mr. Lavin the day I was granted bail by you, sir.

THE COURT: Is that the only passport you have?

MR. MALLAH: Yes, sir.

THE COURT: Are you married?

MR. MALLAH: No, sir.

THE COURT: Where do you reside normally?

MR. MALLAH: 181 East 73rd Street.

THE COURT: What apartment is that and in whose name is the apartment?

MR. MALLAH: Miss Nancy O'Malley.

THE COURT: What is the telephone there?

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MR. MALLAH: 628-0069.

THE COURT: Have you any relatives in the city?

MR. MALLAH: All my relatives. I have a brother with the Department of Sanitation for 27 years --

THE COURT: Would you state his name?

MR. MALLAH: Charles Mallah.

I have a sister --

THE COURT: What is his home address?

MR. MALLAH: 300 West 49th Street.

THE COURT: In New York?

MR. MALLAH: Yes.

THE COURT: What is his telephone?

MR. MALLAH: Circle 6-0990.

THE COURT: His occupation with the City of New York?

MR. MALLAH: Yes, for 27 years.

THE COURT: In the Department of Sanitation?

MR. MALLAH: Yes.

THE COURT: In what division?

MR. MALLAH: The engineering division.

THE COURT: What other relatives do you have in New York?

By the way, is he married?

MR. MALLAH: Yes. I have a sister, Mrs. Florence

Radlow, with the City Planning Commission.

THE COURT: Spell her name, please.

MR. MALLAH: R-a-d-l-o-w.

THE COURT: Her address and telephone?

MR. MALLAH: It is in Brooklyn, New York. I don't know the exact number, but she is listed in the book.

THE COURT: What is her occupation?

MR. MALLAH: She worked for Judge Murtagh for nine years and now she is with the City Planning Commission right now.

THE COURT: New York City Planning Commission?

MR. MALLAH: Yes, sir.

THE COURT: Any other relatives?

MR. MALLAH: I have another sister, Mr. Vivian Glasberg. She is not residing in New York right now. She just left New York.

THE COURT: What other roots do you have in New York, if any?

MR. MALLAH: I have aunts, uncles. I have a number of people -- any number of people that would vouch for my not fleeing.

THE COURT: How about yourself, will you vouch for that?

MR. MALLAH: I swear to it to this Court today.

THE COURT: You understand that if you are released on bail pending an appeal, that any violation of the basis of that release and failure to be amenable to the requirements of the Court would involve you in a possible new charge, the penalty for which would separately be five years in prison and a $5,000 fine? Do you understand that?

MR. MALLAH: I understand that perfectly.

THE COURT: What is your age?

MR. MALLAH: 48 years.

THE COURT: What is your education?

MR. MALLAH: I have three years of high school.

THE COURT: Have you had any gainful occupation other than the one you described on the witness stand?

MR. MALLAH: When I was very young I worked for the-- prior to my going into the service, I worked for the War Department in a civil service capacity.

THE COURT: Have you had any recent gainful occupation?

MR. MALLAH: Yes. I had Gildersleeve and Company, a clothier on Madison Avenue. That was as recent as 1969, '70, and part of '71.

THE COURT: That is the most recent business occupation?

MR. MALLAH: Yes. But I intend to occupy myself

with something.

THE COURT: Are there any other specific matters the Government would like to have the Court inquire about?

MR. LAVIN: I don't know if it is really a proper question, but --

THE COURT: I would like to find out about your -- the Government says you have stashes of money.

MR. MALLAH: I have no assets whatsoever.

THE COURT: You don't have an automobile?

MR. MALLAH: No.

THE COURT: You have no real estate?

MR. MALLAH: Nothing whatsoever.

THE COURT: You don't own an apartment?

MR. MALLAH: No.

THE COURT: You have no valuable jewelry?

MR. MALLAH: I have the ordinary jewelry, watch and cufflinks and things like that.

THE COURT: In what area of value are those, all together?

MR. MALLAH: I will make a rough estimate, about $1,000, $1,200.

THE COURT: Have you any assets in anyone else's name?

MR. MALLAH: No, sir.

THE COURT: Have you any bank accounts?

MR. MALLAH: I had two bank accounts that were seized by the Government. I had one under my name, which there is a lien on it, from the IRS.

THE COURT: Where is that located?

MR. MALLAH: First National City Bank, 63rd and Third.

THE COURT: In the name of --

MR. MALLAH: Benjamin Mallah.

THE COURT: A checking account?

MR. MALLAH: Yes.

THE COURT: Then you had a savings account in the name of Geller?

MR. MALLAH: Geller, David Barton.

THE COURT: Is that one of the ones seized?

MR. MALLAH: They were both seized.

THE COURT: Have you used any other assumed names in the last ten years?

MR. MALLAH: Yes. Prior to David Barton, for the purpose I explained when I took the witness stand --

THE COURT: Give me the list of your names, please.

MR. MALLAH: I used Scott and Eller --

THE COURT: Is that a last name, Scott?

MR. MALLAH: Yes.

THE COURT: What was the first named used?

MR. MALLAH: I used my own first name.

THE COURT: Benjamin Scott?

MR.MALLAH: Yes, sir. And I used an apartment under Eller, E-l-l-e-r.

THE COURT: What apartment was that?

MR. MALLAH: That was on East 74th Street. That was a few years ago.

There are some names that I don't recall that if I could remember with the realty company I used to go to --

THE COURT: Would you, when you have an opportunity to, canvass your memory, communicate the information to the Assistant United States Attorney, of all the names you used and the connections in which you used them and the approximate dates. That information should be furnished and submitted to the United States Attorney.

Is that agreeable?

MR. MALLAH: Yes.

THE COURT: What else do you think, Mr. Lavin?

MR. LAVIN: That is what I was going to ask about, your Honor, the cash.

THE COURT: Does Miss Nancy O'Malley know that the jury has found a verdict against you?

MR. MALLAH: Yes, she knew this morning, sir.

THE COURT: Have you made her aware that her bail assets are up as a basis --

MR. MALLAH: She is aware of that, yes.

THE COURT: Is she agreeable to continuing as your bail sponsor?

MR. MALLAH: Yes, she is.

THE COURT: I think under the circumstances the Court will continue the bail pending the prompt and expeditious filing of the appeal in the regular course. Of course, you can't file an appeal until after sentence, but I am stating it now for then.

The bail will be continued until the date of sentence and Mr. Mallah will be expected to fully cooperate with the probation department so that they can get out their pre-sentence report.

MR. LaROSSA: Yes, sir.

THE COURT: Anything else, Mr. Lavin?

MR. LAVIN: No, your Honor.

THE COURT: All right. That concludes that matter.

MR. LaROSSA: Thank you.

THE COURT: Now, the same disposition will be made in the case of Mr. Barney Barrett. The date of sentence is fixed for February 26, 1974, at 10:00 a.m., and Mr. Barrett is remanded in the meantime, continued remanded.

MR. PELUSO: On behalf of Mr. Mitchell, Judge, I would like to reserve any rights to any motions he may want to make.

THE COURT: Such motions as should be made this morning ought to be made.

MR. PELUSO: Then I would renew the motions made by Mr. Mitchell originally.

THE COURT: All motions at the close of the case, the close of the Government's case and the entire case?

MR. PELUSO: Yes, Judge.

THE COURT: Those motions are denied.

I am marking it writ satisfied and Mr. Barrett is remanded in lieu of bail.

Would you communicate to Mr. Mitchell the sentence date?

MR. PELUSO: I will.

MRS. ROSNER: The only two counts on which Mr. Catino was indicted have likewise been resolved by the jury and we have no further matters.

THE COURT: Are there any motions you wish to make?

MRS. ROSNER: No, sir, except to renew the motions made during the course of the trial and at the close of the evidence.

THE COURT: Those motions are denied.

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A pre-sentence report will be ordered also in the case of Mr. Barrett and a pre-sentence report -- I wanted you to be aware that I have ordered a pre-sentence report, Mr. Peluso.

A pre-sentence report will be ordered in the case of Mr. Catino and the date for sentence will be February 26, 1974, at ten o'clock, in Room 1305.

What is the status as to bail?

MRS. ROSNER: Your Honor, Mr. Catino is at liberty on a $50,000 surety bond. I would note, your Honor, that as your Honor, I am sure, knows, this is the second prosecution within recent months which Mr. Catino has undergone in this courthouse.

THE COURT: Was the other one the one before Judge Ward?

MRS. ROSNER: Yes, your Honor.

THE COURT: What was that prosecution for?

MRS. ROSNER: For violation of the narcotics laws of which Mr. Catino was acquitted by verdict of the jury, and I would note, your Honor, it was a one-count conspiracy indictment. During the course of those proceedings Mr. Catino was at liberty on bail, there were very extended jury deliberations, over a period of several days, and he faithfully attended all the proceedings in that case.

THE COURT: Does Mr. Catino have a passport?

MRS. ROSNER: No, your Honor.

THE COURT: Did you ever have one?

MR. CATINO: Yes, your Honor.

THE COURT: When was the last time you had one?

MR. CATINO: Prior to the last case, while my mother was discarding summer clothing she inadvertently burned it and I reported it to the Passport Bureau.

MRS. ROSNER: Judge Ward was informed of that also, your Honor.

THE COURT: Has a stop been put on that passport?

MR. LAVIN: No, your Honor.

THE COURT: The Government will arrange to stop that.

I will hear the Government in respect to the matter of bail pending sentence.

MR. LAVIN: Mr. Catino in 1959 was convicted of manslaughter in the first degree and received a sentence of 5 to 15 years. I don't know how long he has served. In 1966 he was convicted of a violation of the federal narcotics law and received five years. This is his second federal narcotics conviction. So therefore he is facing a possible maximum of 30 years on each count.

In 1973, as Mrs. Rosner indicated, he was also

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arrested on another conspiracy charge, charged with the importation of large amounts of heroin into the United States. He was acquitted of that charge, but during the course of that, he had told the special agent, Len Fitzgerald, that he would never go back to jail and would go to Europe, where he had friends, and Special Agent Fitzgerald filed an affidavit to this effect before Judge Ward for a bail increase --

THE COURT: Did you make such a statement?

MR. CATINO: No, your Honor.

MRS. ROSNER: May I note, your Honor, Judge Ward rejected those allegations in a factual hearing held on the question of bail and denied the Government's application to raise Mr. Catino's bail, and he was in fact released on bail.

THE COURT: Who was the sponsor for your bail?

MRS. ROSNER: Your Honor, the sureties which have been posted on that bail are as follows: Mr. Catino's uncle, Anthony Catino, and he has provided a passbook of savings with $17,000 in it.

THE COURT: What is his address?

MR. CATINO: East 106th Street and Third Avenue. He is a retired city worker.

THE COURT: What is his full name?

MRS. ROSNER: Anthony Catino. The last name is spelled the same way as the defendant's.

His mother-in-law, Mrs. Teresa Padoudo, provided a passbook for savings with $5,000 in it. His cousin, Jerry DeFilodefeo, provided a passbook with savings in the amount of $5,000. A close family friend, Mrs. Mary Marricco, provided a passbook with savings in the amount of $5,000. Michael Barone, who is Mr. Catino's cousin, has posted the deed to his own home, his own residence, which was estimated by the bondsman who posted the surety bond as being valued at $36,000.

THE COURT: What was the name of the surety company?

MRS. ROSNER: I believe it is Mr. Newman's bonding company. Al Newman's company.

MR. PELUSO: Public Service Mutual, your Honor.

MRS. ROSNER: There are some background facts which I think the Court should be apprised of. Mr. Catino's wife suffers a very, very serious heart condition. As a matter of fact, yesterday morning, your Honor, when she was absent from court, she had been taken to New York Hospital because of pains in her chest. Mr. Catino and his wife reside in a fifth floor walkup at 1500 Honer Avenue in the Bronx and have two small children. It is Mr. Catino's desire, in light of the turn of events which have taken place, to relocate his family on a lower floor, if possible, either in that building or in the vicinity, because Mr. Catino's mother lives in the

area also. It is a tremendous strain on her to live in that situation, in a fifth floor walkup, a strain on her heart.

THE COURT: Did you say they have children?

MRS. ROSNER: Two small children, your Honor.

THE COURT: What are their ages?

MRS. ROSNER: His son is two years old and his daughter is seven years old. The family has been on welfare since Mr. Catino's release from prison in 1970. The rental on their apartment is $95 a month. To my knowledge, and I am sure Mr. Catino will correct me if I am wrong, the family possesses no assets whatsoever, real estate, bank book, stocks, automobile, nothing of the kind.

THE COURT: Is that correct, Mr. Catino?

MR. CATINO: Except for any son's baptism, whatever he got, a few bonds.

THE COURT: Mrs. Rosner has now made a representation to the Court, and I don't want to hold her to it, I want to hold you to it.

Is that representation correct?

MR. CATINO: Except for the bonds, yes, sir.

MRS. ROSNER: How much in bonds, would you estimate?

MR. CATINO: $3,000 in bonds.

MRS. ROSNER: I would only note, your Honor, that having been permitted to go home last night and having

appeared this morning I think is the very best evidence of the fact that Mr. Catino is not going to become a fugitive, your Honor.

THE COURT: Well, I think there is other evidence. His demeanor indicates that he is not just about to run off and as a cautionary matter I want to say to you, as I said to Mr. Mallah, that a failure to cooperate with the probation department, the U.S. Attorney's office, and to appear in court as required might be evidence of violation of law which would subject you to a new possible charge, the penalty for which would be five years in prison or a $5,000 fine or both as a maximum.

Do you understand that?

MR. CATINO: Yes, your Honor.

THE COURT: And do you undertake to cooperate and be present as required?

MR. CATINO: Yes, your Honor.

THE COURT: I will continue the same bail until the date of sentence.

MRS. ROSNER: Thank you, your Honor.

MR. CATINO: Thank you, your Honor.

THE COURT: Does that conclude the matters, for the moment?

MRS. ROSNER: I believe it does, your Honor.

THE COURT: Then you may be excused, Mrs. Rosner.

MRS. ROSNER: Thank you, your Honor.

THE COURT: I will see Mrs. Rosner in my robing room with the reporter.

MRS. ROSNER: May I just speak to Mr. Catino for a moment, your Honor?

THE COURT: Yes.

(Pause.)

(In the robing room.)

THE COURT: Mrs. Rosner, I want to refer back to the incident in the courtroom in which you were held in contempt. I would like to get your explanation on the record to save you the inconvenience of attending here on the 10th, as ordered.

MRS. ROSNER: I thank the Court for that opportunity.

All I can say, Judge, is that I really did not intend to violate any stricture or order of the Court or to do anything to subvert the process of justice in this court. I feel very, very strongly about the defense of Mr. Catino, having known him and defended him in the past, and I am afraid advocacies got the best of me. I am sorry, Judge.

THE COURT: You are aware, of course, the statement you made in the presence of the jury was a violation of professional ethics and an improper thing to do?

MRS. ROSNER: I am sure that is the case, your Honor, but I did not intend to do it. I did not premeditate pursuing a course in any way improper or unethical.

THE COURT: I think you are deserving of a reprimand for that situation, and it seems to me that you have in your advocacy before this Court or any member of it, to control your emotions and expressions so as to avoid situations like the one that you are in at the present time.

I would like to say to you that there have been rumblings of excesses on your part in various quarters and as a gesture toward assisting you to avoid any such indiscretions in the future and to avoid the unflinching consequences that will occur should there be any breach of proper deportment expected of a lawyer in this court, I am afraid that the consequences will be visited upon you in a very uncomfortable way.

I am, under the circumstances, going to accept your apology and rescind the order of contempt, with the advice to you to avoid getting into any similar or other uncomfortable situation in the future before any Court.

MRS. ROSNER: Thank you, Judge. I know your advice is meant in the best spirit.

(Luncheon recess.)

AFTERNOON SESSION

(2:40 p.m., in open court; jury present.)

THE COURT: Miss Johnson, has the jury completed its work and reached a verdict on the open matters?

THE FORELADY: Yes, we have, your Honor.

THE COURT: How does the jury find on the conspiracy count against the defendant Alfred DeFranco?

THE FORELADY: We find him not guilty.

THE COURT: Not guilty.

How does the jury find on the third count involving cocaine in December 1971 with respect to the defendant Vincent Pacelli?

THE FORELADY: Not guilty.

THE COURT: How does the jury find with respect to the third count involving cocaine in December 1971 as to the defendant Alfred DeFranco?

THE FORELADY: Not guilty.

THE COURT: How does the jury find as to the fifth count involving cocaine in July 1971 as to the defendant Vincent Pacelli?

THE FORELADY: Not guilty.

THE COURT: How does the jury find in respect to the sixth count involving heroin in November 1971 with respect to the defendant Vincent Pacelli?

THE FORELADY: Guilty.

THE COURT: How does the jury find in respect to the second count involving cocaine in December 1971 with respect to the defendant Vincent Pacelli?

THE FORELADY: Not guilty.

THE COURT: Ladies and gentlemen, you have heard the report of your foreman in respect to the verdict.

(Each juror, upon being asked by the Court, "Is that your verdict," replied in the affirmative.)

THE COURT: Ladies and gentlemen, that completes your service, faithful service, in a reasonably lengthy case, and I want to thank you on behalf of all parties and the Court for your faithful attention. I know the physical strain on you to have to work far into the night and then come back in order to complete this, and you are now discharged with the thanks of the Court.

You may leave.

(The jury left the courtroom.)

THE COURT: The defendant Alfred DeFranco will rise.

The verdict having been that you are not guilty of the charges, you are discharged and any bail is exonerated.

MR. PELUSO: Thank you, Judge.

THE COURT: With respect to the defendant Vincent

mbgs

Pacelli, the additional finding of guilty is in connection with Count 6, the others the verdict having been taken on report last night. Are there any motions?

MR. DUKE: Yes, your Honor, I'd like to renew all motions made during the course of the trial.

THE COURT: The motion is denied.

The issue was one clearly of fact for the jury's resolution.

The pre-sentence report will be ordered, or updated as the case may be, and the date for sentence will be fixed at February 26, 1974, at 10:00 a.m. in Room 1305.

Since the defendant is presently in custody, he is remanded on this charge.

That, I believe, completes this case.

(Case concluded.)

DEFENDANT'S EXHIBIT--TRANSCRIPT OF TELEPHONE CONVERSATION BETWEEN SAM KAPLAN AND JOSEPH CONFORTI DATED OCTOBER 20TH, 1973.

Conversation between Joseph Conforti, Sam Kaplan
October 28, 1973

Conforti (C)

Kaplan (K)

C Hello

Unknown How you doing?

C All right--how's everything?

Unknown He's here you can talk to him.

C Alright

K Hello.

C How you doing,pal?

K I don't know--sick--sick.

C Well you gonna be more sick.

K Why, whats a matter?

C You're in--you're in more trouble.

K What happened now?

C They got a guy down there who wants to do some talking.

K Who, what guy?

C I ain't gonna tell you his name. Well, this is how it is--Iwant down to the D.A.'s office --I'm still on another case. And Tele--it turned out to be that this guy wants money or else he's gonna talk--about you. Me, Louis and some other shit that he knows.

K Uh--This guys so--you know Joey its a funny

DEFENDANT'S EXHIBIT

K (Cont'd) thing I start trial this Friday on that other case.

C Which one is this?

K I got an old case-two years old-Federal case.

C Yeah

K Right, I had Ceil Muletto, mother fucking lying cunt.

C They've got guys down there for two years--two fucking years.

K Listen to me--I never did nothing but good for her I'm the only one who went and bailed her out because her kids called up and everything. She went and got up on the fucking stand with cock and bull stories. Looked to destroy me this mother fucker. For what reason I'll never know.

C She ain't got nothing to hold ya.

K I'm saying

C I know

K But the only one that ever did good for her--who bailed her out when she was in trouble. Then Ray tells me that a guy called here two weeks ago.

C Yeah, three weeks ago.

K Three weeks ago--and says to him if I don't get $20,000 I'm going to frame you, Sammy, Vic and some other guy--why do people do this?

C I don't know--I'm in the middle--this guy mentions my name.

K That's the guy who called here?

C Yeah--No, not him. He had from what I understand

DEFENDANT'S EXHIBIT

C (Cont'd) he had a relative call. The kid got so nervous and all that shit. I don't know what happened--but it turns out to be

If he brings up my name--I'm right in the fucking middle here.

K But I don't even know who this is--I, Joey, you know me--how long you know me Joey?

C What, two years.

K Two years. So if you know me two years how can this guy say he did something with me and you?

C Well

K The first time I met ya I took you over to the job to get the construction thing right?

C Yeah--but yeah

K I don't believe these people. What do they want to do? Fucking Hang me.

C I don't know, Sammy.

K I got framed on two cases--one with Cecil--I went for my fucking lungs over there--I'm still paying through the nose--I got another case I start this Friday in Brooklyn--whats that, Eastern District

C Yeah.

K And then you make a guy call up and look to shake me--Where am I going to get $20,000?

C He don't want 20--He don't want 20.

K What did he say now

C He says 10

K 10 or else he's going to frame me on another

DEFENDANT'S EXHIBIT

K (Cont'd) case. I don't believe these guys--Is that what he told ya?

C Sammy, look-remember those flowers I sent you at the hospital.

K Hello, Hello, Hello, Hello.

C Yeah, listen--this kid--

OPERATOR: End of initial period, please signal when through.

C Okay dear

K Yeah

C Well this is what I got. If he speaks to the guy down there--What are they gonna do--There gonna grab you from where I am

K But what did I ever do with this guy Joey?

C I don't know--He mentioned a kid out on the coast suppose to be commin'in.

K On the coast--

C Yeah, I don't know-this fuckin' guy is all fucked up.

K I don't believe this Joey, but in other words if I don't come up-this guy's wild--what did he tell you this guy?

C He was one of the guys with Louie when he brought flowers up (inaudible) Some kind from your end.

K My end?

C When Louis was around and he had to pick up stuff--

K Louis never gave me but aggravation and take him to shylocks.

DEFENDANT'S EXHIBIT

C I know.

K How many times did I take him to get money from shylocks Joey?

C Sammy, look. I know what your're up against and you know where I am. Alright--I'd let things go if--

K I know, so Joey look--

C I don't want to bring that up you know

K What kind of alternative did this guy give me?

C Huh?

K What did he tell you to tell me?

C He's telling me you've got a week and one-half. He's gonna call me up and get word to me when I go down there again with the D.A.

I was supposed to give you an address where to mail it.

K Yeah.

C And that's it (inaudible) He's leading me on.

K Or else he goon'do--what, he's gonna frame me?

C No, he's gonna go down--He's gonna speak to the D.A. and memtion me and all this bull shit.

K In other words it just comes out to a point blank thing--that either I give him this fucking money --go out and steal it now or he's gonna send me to jail on a frame charge, right?

C Sammy, I don't know what's goin' on, I swear to you.

K But what do you think it is Joey? Tell me, are you supposed to be my friend or my enemy?

DEFENDANT'S EXHIBIT

C I'm--I'm a friend

K Alright, I understand you're my friend--But, but what did this guy say to you.

C I'm not gonna mention his name

K I don't believe this man--you don't have to mention his name.

C Now we're down to (inaudible)

K I don't believe this man -- go ahead -- Hello

C Yeah, when Louis was moving around right--this kid was with him, now--I got some stuff and when I came to you in Brooklyn he was with me --I was in this guy's car.

K Got some stuff? When did you come to me in Brooklyn?

C In the hospital

K You came to visit me--you brought Louie's brother up there.

We never did nothing, Joey, right? Did you testify in Court we never did nothing.

C I never, I wanted, I didn't say nothing.

K All right so you came to the hospital and you saw me. Irregardless this guy says now he did some thing with me now in California

C He was with Louie out in thecoast and he was bring some stuff in with him.

K Jesus, I don't believe this bit

C (Inaudible) --id and fucked around with him.

K And I know this guy?

C Yeah.

DEFENDANT'S EXHIBIT

K Aw - come on.

C Listen to me, this guy was fucking around with Louie and then--when he was waiting with his (inaudible) and all this bull shit--he kept giving stuff to him--now--Right--I had to get some stuff off him--when and came to hospital and gave you these flowers. He was down stairs waiting for me.

K So what--you didn't do nothing wrong there. You brought Louie's brother up to the hospital. Why, why do people keep mentioning the hospital?

C When you had your stomach operated on--

K You came up there--you brought Louie's brother up there and that's all we ever did.

C Well he was with me when I came up.

K So what's so terrible about that--what'd you do, you brought Louie's brother over there. That's no crime, bringing Louie's brother there.

Joey, let's forget about this here. Please just do me a favor--

C I'll tell you the truth--(inaudible)

K I appreciate what your doing.

C I'm right in the middle.

K I know your in the middle and I appreciate it this. But for a guy to say--what'd he tell Ray on the phone because I can't make two cents with Ray, he's like a nervous thing. He's ready to jump out the window--you know what he told Ray?

C What?

K He said to Ray either you give me $20,000--He said I got a letter from Joey.

C Right

DEFENDANT'S EXHIBIT

K And Joey was in Court with your friend Sammy --Right and he didn't throw him in on no raps He didn't frame him, he didn't look to hurt him.

C Right, which I didn't Sam.

K Right, listen, he buried enough people there. He ain't afraid to bury no one--listen to what he said. Let me finish alright and you just tell me yes or now because maybe the guys bull shitting. He says he buried everyone on the case with him whoever he has to bury, he'll bury. He didn't rat your friend out or frame him or do anything to hurt him. Right?

C Right.

K Ah--I'll tell ya.

C This guy got pinched. Three weeks ago on that last roundup.

K Wait, wait then I think he said - ah--hold it-- help me just thibk what the hell he said--ah, that I don't remember what the fuck else he said, oh no, then, the second one was that-----when you spoke to him the second time--you said to him tell Sammy that he's lucky that I didn't throw him in the last round that I didn't want to frame him or do anything to hurt him. Did you tell Ray that?

C No.

K I thought you said he told you that--The second sweep or something.

C Yeah, I mentioned to Ray this Kid got picked up on the second round two weeks ago.

K And that he didn't throw me in--he didn't look to frame me there.

DEFENDANT'S EXHIBIT

C How could he throw you in he didn't mention you. How could he throw you in, he didn't mention you.

K Ray was telling me something. I'm lucky I didn't get thrown in on the second sweep--I said what second sweep?

What's the second sweep-they're making another pinch now?

C Right.

K This is another case...this government has been after me for two years, three years--They threw me in on four cases already, three cases--one I beat--with a tax stamp--the next one I got pinched with some kid in Brooklyn and was over his house---he was in the street two blocks away. They three me in on the thing over there. I got thrown in from Cecile.

C Right.

K Who I did not but good for--you know that.

C Me, too.

K Unbelievable man--And this guy's telling you now--Holy Christ Amigh--In other words it boils down to one thing. I got to either get up the money--

C Yeah--

K --or else he's gonna frame me--

C Right.

I don't know he's gonna do Sammy--I don't know what this fuckin guy's gonna do--

K Well, how come he told you to call me.

C Because he knows me.

DEFENDANT'S EXHIBIT

K Yeah.

C This guy knows me Sammy and he knows that I know you. And he knows I been dealin with you.

K Joey, we never did, Joey. Please.

C That's what I told this guy.

K Joey did we ever do anything together--tell me the truth right now. For myself. Have you got a tape on the phone Joey. Please don't do this to me.

C Laughter (inaudible)

K Jesus--Joey tell me the truth--you got a tape on this phone?

C No, I swear--on my children--may they go blind.

K My God.

C Public phone.

K I didn't even realize it, you're right. The operator just cut in before.

C (Inaudible)

K Joey, I'm like a fuckin--I'm going nuts--I got a case this week that they're looking to fucking hang me for nothing over here because of the other case.

C Right.

K And you know that Joey and--When they had you down there, how many times did they tell 'ya--they promise you the world if they make ya--

C You know what happened? They got this kid there.

K Joey, I don't mean that.

C Let me tell you something, Sam.

DEFENDANT'S EXHIBIT

K Go ahead.

C They threw shit on me that I did and they threw the shit right on my lap.

K And they framed ya...

C --you know when Louie got pinched.

K Louis got pinched with Herbie, you know, that night with Herbie--I was with Louis.

C Last February. No, not with Herbie. By himself, first. I was up there, waiting for him and something had happened. Witnesses said this and saying that I had to do with it--you know.

K I don't believe this. In other words, they framin you, too.

C Oh shit. On the stand, they say this and say I'm doin this and I'm doin that.

They know its (inaudible)

K So what do they want from you now?

C I don't know. All I know I gotta go two more cases.

K In other words, if you don't lie, they're gonna hang you.

C Yup.

K Huh--

C That's the way it is.

K In other words, it boils down to the same thing--if this guy don't lie about me- If this guy wants to lie about me--whoever he is--He's gonna lie about me. I'm dead.

DEFENDANT'S EXHIBIT

C Yeah, Sammy, they threw shit on me.

K But they're, Joey---please.

C This guy's a fuckin hard-on--

K Yeah, but in other words, he'll be to save his neck and bury me.

C Fuck, I ain't gonna lie to save his neck.

K Not you? Him.

C I got no part in this (inaudible)

K Joey, I'm not sayin that. But he'll lie to save his neck. He'll throw me in on something, on another sweep here.

C I don't know. I don't know.

K Is that what he told you, though?

C You know---something like that.

K Unbelievable.

C I know when I got--what I had to do and that's it. You know what I mean.

K Joey--what's this guy's first name. Don't tell me his last name.

C No.

K Jesus Christ, I got fuckin peope--Ray, do you believe this thing here?

C Do you, do you think I felt good in that mother fuckin chair lookin at Herbie and all--what I had to do?

K Joey, I'm not sayin you felt goo--I seen the way you were sittin up there--you were nervous as hell.

DEFENDANT'S EXHIBIT

C I had a load of shit in my fuckin pants.

K And I know that they tell you what to say. They school you--and they sit there and talk to you and they get you so fuckin shook up that you don't know what you're talking about.

C I tell ya (inaudible) long way.

OPERATOR: Sorry to interrupt, but additional charge now due. $1.65 for ten minutes.

K Then what?

OPERATOR: Pardon.

K No, No. I'm sitting here-he'll deposit it---you want to reverse this here, Joey?

K Hello.

OPERATOR: Just a moment.

Pardon

C Yes.

OPERATOR: That was $1.50.

C I put it in--I put in $1.65

OPERATOR: I got five quarters, 2 dimes and a nickel. Push the coin release.

C How much I owe you now?

OPERATOR: Fifteen more.

Thank you.

K My mouth is so fuckin dry now I don't even know where I am.

DEFENDANT'S EXHIBIT

C Sammy, I don't what I'm doing. I'm between the shit and the sweat.

K What are they doin to you--why don't they leave you alone now?

C Sammy--I'm gonna go away--I know that.

K After.

C I looked so fuckin good on the stand, like I'm gonna get another right.

K After they promised, they're gonna let you off--they're gonna send you away, now.

C They didn't make me no fuckin promises, they first promised they're gonna take care of my family, whatever, put them in a safe place, whatever.

K You don't have to worry about your family. I think. Because everyone is away.

C Well, Sammy, me--they got me already--I'm gonna do my time and when its all over you know I'm gonna start a new life and whatever.

This is what this guy's fucked up-----Sammy.

K Joey-

Joey

C (inaudible) army base--they talk like its nothin', you know. I was sick when I walked out of that office.

K But these guys are lyin'...they get 2-1/2 years to lie and you're gettin' 3 years for telling the truth.

C I'm gonna get more than that.

K Unbelievable

C And huh---

K You know, Vic blew his appeal---

DEFENDANT'S EXHIBIT

C Sam what do you want me to do?

K Nothin', I'm just sayin', he blew his appeal too,The whole fuckin' worlds cavin' in Joey, you tell this guy I'm goin' to trial Friday.

C Yeah.

K He's gotta give me a little time with this Joey, I ain't got no fuckin' money--I have two cases right on top of another. I'm still pay-in' the fuckin' lawyer money.

C I told him your moneys all tied up

K It's not tied up--you didn't know I was going' on trial.

C Yeah, I knew it--I told him that. I says this guy might have 3, 4 or them to go yet. And the way it looks this mother fuckers gettin' money from 8 guys, Sammy.

K He's blackmailin' everybody.

C He's got something like 10 guys. The fuck told me 20, 25--someplaces 30 cause the guy-he mover a lot with a lot of people.

K But he mover with people--let him take money from them. I don't even know who this fuckin' guy--

C Yeah, and there I am (inaudible) get the fuckin' guy.

K And, any you're laughing you - you're - I give you credit though--you're funny man-you laughin' --this guy dont know me from Adam and you're sittin' there laughing. It don't mean nothing.

C No.

K Tell me where to go get the fuckin' money and I'll--tonight I'll go rob a joint for him--I don't know where to go get it.

DEFENDANT'S EXHIBIT

C Maybe I'll come out I'll dig something out for ya--

K Unbelievable.

C I don't know Sam.

K Joey, you get to talk to this guy to give me little time here.

C I know, the D.A.'s gonna call me up this week and I gotta go down there. And they got this fuckin' guy comin' in--I almost (inaudible) He's got another case and he's gonna be with Capra.

K Who's Capra?

C Johnny the Hook--another but Johnny Fuckin' guy--Carmine's mob--

K I don't know none of these well--you know better than anyone else--they thought I was a cop when we got pinched.

C I know it.

K They thought they sent a cop into the cell I don't know them guys didn't even want to talk to me--they said who the fuck is this guy--he's a cop. They asked you if I was a cop when I came in there.

C Yep

K I mean the guys in the cell?

C No, No. I'm talking about the guys in the office.

K They asked you if I was a copy--unbelievable. That's another thing. I got people on account of this Cecil. Guys commin' down from Internal Affairs to question me. The whole fuckin' world, Jadjari, whoever the hell they are, I don't know--Commissioner's office.

C Remember when Ceil talked about this man is bad.

DEFENDANT'S EXHIBIT

K This mother fucker--This is a broad man, I don't know why--in a million years I don't know why--maybe because I never picked her.

C I don't know. Even this guy knows her-he mentioned that shit too.

K Ah-this is her bullshit then--I know what this is then. She's sittin' in there talkin' to him and between both--does he know Ceil?

C I guess so.

K Between him and Ceil--you can bet me Joey and you know I ain't that dumb--they must have been talking and said fuck it--call him up.

C That's right (inaudible) came down the office.

K They said call him up -- get some one to call him and we'll tell him we're gonna frame him unless he comes up with $20,000.

--tell me 20 -- where am I gonna get 20 M from?

C 10---Sammy I don't know--what this guys doin'.

K Joey you got to tall this guy to give me a couple of weeks more, let me get on trial first.

C (inaudible) I got to go for sentence maybe in another week, week and onehalf from now--I don't know if I'm goin' (inaudible) They're gonna move to win another indictment on me. When I'm over with this they're gonna slam another on me. I don't know in institution or where. They promised me one thing--if I look good on the fuckin' stand in front of all these people--

Look at this mother fucker----talking, talking and meanwhile all shit suppose to be gravy at end.

That's bull shit--that's bullshit because I plan to go away. Hello.

K Yeah, I hear ya.

DEFENDANT'S EXHIBIT

C I plan to go away for 3 years maybe a little more.

K Shit.

C And it all looked good--that fuckin' Herbie--lookin at me--the guy was good to me-- The shit they had against me, man I could have been there with him. I don't know, Sam.

K Joey, Joey, I know where your head is at. I see the way your talkin'--

C ---there---I was cryin in the fuckin' office. I couldn't see myself doin' this to this guy, ya know. That hit me (inaudible) to do something like that, ya know.

K I know it, man

C They kept on pumping me about you, this that..

K They just want you to get on the stand and tell them any fuckin' story about me--they would have you off with the three years probably.

C (inaudible) Shake my had no

K And what they tell ya-tell us anything-make something up

C They didn't go to that extent. The kept just re-laying with Cecil, you know, but then with your phone number on her book and that right--getting something going, ya know.

K Sure, who's the one that bailed her out--that's how my fuckin' number got on there--all them fuckin' calls--Reverse calls, Reverse calls--

C Right, I don't know.

K Should have let her rot in jail, man. Her kids called my house, my wife told that time, Sammy, don't get involved with this girl she's no good. Right before Easter, remember Joe?

DEFENDANT'S EXHIBIT

C Sammy, she put me in the fuckin' hold and I'm gonna to get out of it.

And for those 3 fuckin years Lou was away, I helped her.

I got it right in the fuckin' ass. My wife was sick.

K What's a matter with your wife?

C No, because of this shit. All because of this cunt opening up her fuckin' mouth.

K How's the kids--she give birth yet?

C And she accused me

K What she have?

C A girl

K Lots of luck

C She accused me

K I really mean lots of luck to ya

C And she

K You're laughin again

C And she accused me of killing her fuckin' husband

K Accused you of killing her husband

C Yeah

K She accused everyone else of it too.

C Yeah, and when she saw me in fuckin' court she couldn't believe it--ya know (inaudible) that I was testifying, ya know.

K You know, Cecil Muletto better than anyone else

DEFENDANT'S EXHIBIT

C (inaudible) Everytime I went up there with packages, money or food or whatever and then she goes and mentions my fuckin name.

K But you know her better than anyone else Joey--

That she's a lyin' junkie mother fucker.

C That's right. I don't know if I'm goin' or commin'--that mother fuckin' woman (inaudible) I don't know--

K Joey, do me a favor--you know this guy tell him please man, I don't want to be framed for nothin'. Please, Joey, let him give me a little time.

C I don't know when I'm goin' to see this fuckin' idiot.

K Tell him to give me a couple of--I'm goin' to trial Friday, the 5th--I was supposed to start this Friday, 26th and was supposed to start-- It will be Monday the 5th-Monday the 5th.

C I was supposed to get sentenced Monday but he postponed it. So don't know what the fuck they doing to me you know.

K Joey, please get to this guy and tell him. Please man, I don't want to be framed for--If I did something--

C Yeah.

K Joey, you know where its at--If I did somethin' with this guy I would say fine. You got me-- but for this guy to say I'm goin' to say this and say that unless he gives me the money--he gotta give me time man. I ain't got a fuckin' dime. I'm working for a fuckin' living since January, Joey I'm in construction.

C Break your back--

K I am, my friend, I am--you laugh, you laugh, you know--you're a fuck man, you laugh--

DEFENDANT'S EXHIBIT

C I'll be painting the bars.

K Huh

C I'll be painting the bars

K You ain't gonna paint no bars. They'll send you to an army base some place.

C I don't know...I don't know and I don't give a fuck.

K Joey, you did enough for them. One thing--you didn't lie.

C What?

K You said you didn't lie so they can't hurt you too much. They'll make ya lie--don't worry--before its over they'll make ya lie like a bastard.

C I won't lie--that's one fuckin' thing I won't lie.

K And what this guy tell you--he'll be through--

C The fuckin' guy looks like a nut

K What'd he say?

C He's in the fuckin nut house

K Oh, he's a nut hourse?

C They got him in a nut house.

K And he's gonna lie and then and what he tell ya--He's gonna lie about me unless I give him the money.

C Well he didn't saylie--Sammy I swear--He didn't say lie. He said he did some dealin' with the other guy that lost his appeal--Louie's around when he got shitcanned.

DEFENDANT'S EXHIBIT

K Bur what do I know. Does he know me?

C Who the fuck knows--I don't know. Sam, I -- wasn't even fuckin'around with Louis then-- when he was bringing coke in--I don't know what this guys talking about.

And they got him out there. They took him out there and got him on a rap in New York.

K Huh

Unbelievable, they find people man.

C He said to me I'm a fuckin' loser. They send me away and then (inaudible) Whatever I get I caught.

Trying to get in touch with you--look at this fuckin's guy--now he's wants to play games with me, and try and tell him what's going on. Sam, what they got in there there fuckin' rats--I get sick I get fuckin' sick the people they got up there--give fuckin' help-they write names, names, names, figures, oh man.

K Oh, my God--you know

C They got fuckin' witnesses I don't know where they get them from.

K All my life I always heard of blackmailers but this guys the worst man--and he's in the nut house, too.

C They got him in a nuthouse. They moved him out of one joint and put him in another joint. They had him in the nut house--now they got him in another joint.

K Unbelievable, I don't believe it man--I won't sleep for another two weeks now. Joey, please talk to this guy and tell him to give me another couple of fuckin' weeks to reaise this fuckin' money. I don't want--

DEFENDANT'S EXHIBIT

OPERATOR: Sorry to interrupt. There's an additional charge due of $1.65 for 10 minutes please.

C Should I put it in?

OPERATOR: Yes.

C Alright.

OPERATOR: Thank you.

K Joey listen to me--please--I'm saying please to ya because I'm fuckin' sick here.

C I know it

K This guy blackmailed 10 people already--what does he need my $10m?

C That's what I told him--I told him this--He's got his own fuckin' mind. He says I'm playin' the fuckin' records now and you two dance. That's how he left off.

K But you never did anything with him either.

C I did--Sammy, I don't give a fuck--I'll put him away myself. Sammy I'm in a position the more I talk I don't gain nothin'--I don't have to tell you that--

K Joey just speak to this guy and tell him to give me a little time to raise this money.

I don't believe this - ming - I'm fuckin' 6 feet tall and weigh 220 pounds. I got a guy blackmailin' me.

C This guy wanted first 25. I got him from 25. I got him down to 20 (inaudible) I met him down there. I don't know how I----scumbag and I told him look the guys working--he's got another four cases--I told him four cases and they got another woman that's gonna testify--I don't know what they're gonna do with her.

DEFENDANT'S EXHIBIT

C (Cont'd) This guy aint's got nothing, the guy's work-in' (inaudible)

So I got it down to lo.

K Joey, I -- just tell him until my case is over he's gotta give me some fuckin' time. I've gotta get money to my lawyer, too. I ain't got money to give him yet.

C Maybe I meet him again I cut it down a little more. Who the fuck knows I don't know Sammy.

K Joey - just talk to this guy gell him like this here. Tell him Samy don't know who you are but he asks you to do him a favor.

C That's not what he put on me -- He said Sammy knows. Sammy knows. Mention my name. I'll be like second Louis -- He's a lot of shit. But say I'm in the middle-whatever you tell me I do.

K Alright-just tell him--go back to him -- tell him I need some time--let me get through with that trial. I'll raise the money for him. He ain't goin' nowhere. You said right. I don't want to be fuckin' blackmailed, I don't want to be framed, I don't want nothin' nothin' on my fuckin' shoulder. I had enought with these fuckin' mother fuckers lookin' to hang me everywhere - They got a hard-on for me - I know what the hard-on is from.

C From Ceil

K Yeah.

C I guess so

K We both know it - and I don't know why she's got this hard-on for me.

C You know why

K Why?

C Because of her fuckin' husband. I'll tell anybody.

DEFENDANT'S EXHIBIT

K But I never hurt her. You remember I used to go to-

C I know that. I told her the same fuckin thing. She saw me in the room there. I spit at her. I called this, called her that. Three fuckin years I helped you with your habit and your kids. Turn around and do this to me. What happened to my husband you know.

K But did you ask her who bailed her out and who's--

C I told her that.

K What did she say then? Who was the one who used to run and borrow money from shylocks for Louis when he was bullshitin' me that he was broke all the time.

C And meanwhile the fuckin' guy had money.

K Remember when I went to the shylock's, Joey.

C I know it. Sammy, I know it. I'm doing this because I see what's on the other side,you don't. Your're workin' man. When I go down there, the fuckin' marshal's and all that mother fuckin' shit.

I see these scum bags. I thought I was a scum bag. These guys got me beat. They're lower than scum bags - I don't know what to call them.

K Joey, when can you get back to me and let me know what this guy says--you got me all fuckin' shook up here for nothin'. I don't believe it.

C (laughter) Sammy, when I met this fuckin' guy-- Don't you think I laid in fuckin' bed. I was gonna get a call to send me down there again. Me- I have nothing to gain. I'm a loser, I have to go through all this fuckin' bullshit.

I ain't gonna go through it. That's why I'm in the middle and this mother fucker knows it.

DEFENDANT'S EXHIBIT

K Joey, do me a favor. Talk to this fuckin' guy. Look give me some time.

C I talked to Ray.

K Huh

C I'll call up Ray when I see him

K Alright

C I don't want your home phone no more or none of that because from what I understand, you're warm over there.

K Warm they've been wanting to hang me for the last two fuckin' three years. I don't know why man.

C Your name is all over that fuck's office.

K Why?

C I don't know Sammy - I don't know. I try to hint and hint.

K Because--the truth came out on this case with fuckin' Ceil, drunkin' alcoholic junkie mother fucker-- The truth came out so they figure we'll get even with him now. Hello.

C Yeah. Sammy, I don't know what their intentions are. And the only thing they haven't done is (inaudible) Whata you gonna do with this guy?

I don't know what they're doing there. They don't even know what they're fuckin' doin'.

Because they're gettin' all this information for nothing. They're rounding up.

K Joey, do me that, Joey do me that favor man.

C Yeah

DEFENDANT'S EXHIBIT

K Talk to this guy. Tell him I -- Tell him listen--Sammy says you can blackmail him, but let him get a chance to get the fuckin' money. Don't lie.

C That's why-- That's why I tried to get in touch with Ray- get in touch with you and you can get a public phone.

K Well Ray's house -- Ray's house is good. They don't bother Ray. Just tell this guy not to lie about me. I'll get the money to him one way or the other.

C Alright

K O.K. Joey?

C Yeah?

K Alright, thank you.

C Maybe I'll get it down.

K I hope so.

C I feel like a Jew or whatayacall it. What do you call them fuckin' guys-chisler?

K Chisler.

C Everytime I go down there, I get it down lower and lower and lower - I'm trying Sam, I'm trying.

K Joe, one day I can do you a favor the same way man. You'll never know.

C I told Ray - if ya need money I got $2,000 in my pocket. That's all I got and a couple bucks.

K Ray- Ray lent me money a couple weeks ago.

C I told Ray. Tell Sammy I'll put in $2,000 in the kick. I don't know. I don't know what the fuck I'm doin' Sammy.

DEFENDANT'S EXHIBIT

K Joe, just tell this guy please.

C Alright. I'll get----

K Tell this guy not to lie. Don't let him get up there and lie just to frame me. Tell him I'll get the money to him one way or the other. But let me get through with my trial. I go to trial on the 5th. It's a Monday.

C Right

K He can check it out if he wants, if he thinks I'm bullshittin'.

C Alright Sammy.

K Alright Joey - When you gonna get back to Ray?

C Oh, I don't know Sammy. I got to go a couple of times to the D.A.'s office.

K By hook or by crook, I'll get it to him someway.

C O.K.

K But please - I ain't got this kind of fuckin' money now Ray, Joey. I don't even know what the fuck I'm saying no more.

C (laughter)

K You're laughing, you're laughing. You're sitting on the other siee, you know it's funny. You're sitting on the other side - you're gonna go to a country club some place. I'm sitting out here, I'm sweating.

C Sammy, you don't know what I got to do to make a phone call. You don't know what I go to do - I'll get in touch with you, Sammy.

K Alright, Joey.

C And I'll see what I can do

DEFENDANT'S EXHIBIT

K I don't want to be framed, please

C I can't get nothing. I can't reach out the way they got me here. If I reach out I'm fuckin' cooked.

K You'll run into this guy - just tell him what I told ya.

C I'll tell him he's pulling an innocent guy away.

K Tell him, tell him you're pulling an innocent guy away mother fucker. He'll pay ya - Don't do it. You're laughing again.

C Sammy - What am I gonna do? I'm laughing, I'm trying. I don't know - Sam,I feel like I'm a bocchi ball.

K Alright Joey. I wouldn't keep you on no more

C Alright, I'll get in touch - I told

K O.K.

JUDGMENT AND COMMITMENT.

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
v	)	No. 73 Cr 881
	)	
Benjamin Mallah	)	

On this 26th day of February, 1974 came the attorney for the government and the defendant appeared in person and by James M. La Rossa, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I and II narcotic drug controlled substance.

(Title 21, U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21) as charged in Count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

JUDGMENT AND COMMITMENT

IT IS ADJUDGED that the defendant is hereby committed to the Attorney General or his authorized representative for imprisonment for a period of Ten (10) YEARS Pursuant to the provisions of Title 21, Section 841, U.S. Code, The Defendant is placed on Special Parole for a term of THREE (3) YEARS, to commence upon the expiration of his confinement.

Defendant is given a $25,000.00 Committed Fine.

Defendant is placed on $100,000.00 Bail Pending Appeal.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marchal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MILTON POLLACK
United States District Judge

The Court recommends
commitment to

/s/RAYMOND F. BURGHART
Clerk

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

v.

No. 73 CR 881

BENJAMIN MALLAH, et al.,

Defendants.
----------X

S I R :

PLEASE TAKE NOTICE that BENJAMIN MALLAH hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of Conviction entered against him by the Hon. Milton Pollack on February 26th, 1974, wherein the defendant was sentenced on Count 1 of the Indictment, charging him with violations of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), to ten (10) years imprisonment and placed on Special Parole for a term of three (3) years, to commence upon expiration of confinement. In addition, the defendant was fined in the sum of $25,000

Dated: New York, New York
February 26, 1974

Yours, etc.
JAMES M. LA ROSSA
Attorney for Defendant
BENJAMIN MALLAH
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
687-4100

TO:
HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

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1974
U.S. ATTORNEY
SO. DIST. OF N.Y.